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IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

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A. D. DANIELS,

Appellant,

vs.

MARTHA M. CRADDOCK, RUBY I. AUTEN and  
J. B. AUTEN, her husband and WILLIAM  
SHIRK,

Appellees.

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Upon Appeal from the United States District  
Court for the District of Oregon

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TRANSCRIPT OF RECORD.

**FILED**

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Records of U. S. Circuit  
Court of Appeals

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No.

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**Names and Addresses of Attorneys  
Upon This Appeal:**

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**For the Appellant:**

PLATT & PLATT and HUGH MONTGOMERY,  
Board of Trade Bldg., Portland, Oregon

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**For the Appellees:**

KING & SAXTON,

Yeon Bldg., Portland, Oregon

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## I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the state of Wisconsin, residing at Rhinelander in said state.

## II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, Martha M. Craddock, was and is a resident and inhabitant of the state of Oregon, residing at \_\_\_\_\_ in said state, and the defendants, Ruby I. Auten and J. B. Auten, her husband, are residents and inhabitants of the state of Oregon, residing at Klamath Falls, in said state, and the defendant, William Shirk, is a resident and inhabitant of the state of Oregon, residing at Lakeview, in said state.

## III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, one Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

All of sections twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east; and the southeast quarter of section three, township nineteen north, range nine east G. & S. R. M.,  
and was the owner in fee simple of said property de-

scribed in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

#### IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

#### V.

And thereupon your orator fourther shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the state of Oregon, and particularly described as follows, to wit:

East half of northeast quarter of section  
twenty-four, township thirty-seven south,  
range ten east of the Willamette Meridian,  
was surveyed, unappropriated, and vacant public land  
of the United States returned and characterized upon the  
official records of the United States as non-mineral  
lands, free and open to entry and settlement under and  
in accordance with the laws of the United States gov-  
erning the acquisition of public lands

#### VI.

And thereupon your orator further shows unto your Honors:



That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes;" which act provides, among other things, as follows, to wit:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

## VII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, did, in accordance with the provisions and requirements of the Act of Congress of June 4, 1897, set forth in para-

graph VI of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States Land Office at Lakeview, Oregon, the said deed so recorded, together with a full, true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed it to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

East half of northeast quarter of section  
twenty-four, township thirty-seven south,  
range ten east of the Willamette Meridian,  
together with other lands, which selection so made was  
prior in time to the selection or entry of any other person  
or persons whomsoever, and, by virtue of said selection,  
there was initiated a right and interest prior in time  
and superior in right as against all persons whomso-  
ever.

### VIII

And thereupon your orator shows unto your Hon-  
ors:

That regardless of said selection so made as alleged

in paragraph VII of this amended complaint, the defendant, Martha M. Craddock, did, on August 26, 1910, attempt to make a timber and stone entry upon the land described in paragraph VII of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the state of Oregon filed upon the said tract so selected, together with other lands, certain instruments purporting to be school indemnity lists, which lists were numbered Lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States Land Office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States Government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the state of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

....That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action whatsoever had been taken by the proper officers of the land department of the United States, except said Register



and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the state of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since, ever acquired or owned any right, title or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the state of Oregon, purchased from the said state of Oregon by the plaintiff herein.

## XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph V of this amended bill of complaint, were irregular, and that by virtue of the filing of said lists the state of Oregon had acquired no interest and did not then have any right, title or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered

in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the state of Oregon to many innocent purchasers for value, the state of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interests of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the state of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to wit:

“It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncanceled the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry.”

## XII.

And thereupon your orator further shows unto your

Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secretary of the Interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint was made by the said Aztec Land and Cattle Company, Ltd., a corporation, by A.L. Veazie, its attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the state of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of February, 1904, the said lieu selector, the said Aztec Land and Cattle Company, Ltd., a corporation, by A.L. Veazie, its attorney in fact, presented, simultaneously with and together with the selection as in paragraph VII of this amended complaint alleged, a relinquishment from the state of Oregon of all its right, title and interest in and to the said selected land, which said relinquishment was made by the state of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

### XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was

in all respects regular and in accordance with the requirements of said Act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States Land Office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did, on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relinquishment of the state of Oregon, as alleged in paragraph VII and XII of this amended bill of complaint.

#### XIV.

And thereupon you orator further shows unto your Honors:

That subsequently, and on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon,



by which ruling the said local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently, and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint together with other selections similarly made, be allowed as of the date on which they were filed, to wit, the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

#### XV.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River project, the said action of

the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissioner of the General Land Office made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8, 1904.

#### XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selections were filed, to wit, the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the fil-

ing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

### XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selections, so made as aforesaid, were in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part thereof, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

## XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States Land Office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver after duly hearing the respective parties, attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant, Martha M. Craddock, which was made on the 26th day of August, 1910, should be allowed, which decision was subsequently, and on or about the 13 day of April, 1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United States Land Office, as of the date on which they were filed, to wit, February 8, 1904.

## XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day



of .....19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including defendant, Martha M. Craddock, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit, on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraph VIII and XIII of this amended complaint, and further found that the record then before said department fully showed, and every material fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, Martha M. Craddock, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been allowed by the Commissioner of the General Land Office,

as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selections, so made as alleged in paragraphs XV and XVI and XVII of this amended complaint, and further held that said lieu selections, so made and allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A," and, by reference, incorporated in and made a part of this amended complaint.

## XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 18th day of March, 1912, and in accordance with the ruling of the decision hereinbefore referred to in paragraph XIX of this amended complaint, a patent to the following described land, situated in the county of Klamath and state of Oregon, and particularly described as follows, to wit:

East half of northeast quarter of section twenty-four, township thirty-seven south, range ten east of the Willamette Meridian, was issued in the name of Martha M. Craddock, one

of the defendants herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint. And the defendants Ruby I. Auten and J. B. Auten, her husband, and William Shirk, claim some interest in the said real property described in paragraphs V and XX of this amended complaint.

#### XXI

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of three thousand (\$3000) dollars, exclusive of interest and costs.

#### XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays;

1. That the defendant, Martha M. Craddock, may

be adjudged and decreed to hold said land described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in her possession, and be restrained and enjoined from hereafter setting up any claim or title to said land, or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant, Martha M. Craddock, may be adjudged and decreed to hold any timber or other product by her or her servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant, Martha M. Craddock, to make said conveyance and to deliver to your orator any patent or other deeds of the said land described in paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. That the defendants, Ruby I. Auten and J. B. Auten, her husband, and William Shirk, be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith, and that the title to said real property be quieted as to said defendants, Ruby I. Auten and J. B. Auten, her husband, and William Shirk.

V. And you orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Martha M. Craddock, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived) the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

VI. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of, and under the seal of, this Honorable Court, directed to the defendants, Ruby I. Auten and J. B. Auten, her husband, and William Shirk, therein and thereby commanding said defendants, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer all and singular (but not under oath, answer under oath being expressly waived), the matters and things aforesaid and to set up the character of the interest which they claim in and to the East half of the Northeast quarter of Section 24, Township 37 South, Range 10 East of the Willamette Meridian, and to stand and abide by, and sustain, such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

VII. And your orator prays for such further relief



in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt & Hugh Montgomery,

His Solicitors.

HUGH MONTGOMERY,

Of Counsel.

[Exhibit "A"]

D. C. M.

G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.

E. B. Perrin

Lieu Selectors,

A. D. Daniels,

Claimant of Beneficial Interest,

vs.

Archie Johnson, et al,

Intervenors.

The Commissioner

Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to concede to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.



A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been *ex parte*, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarrass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, so many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of \$23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to \$3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncanceled, the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.



This is also the plain holding of this Department in the in California and Oregon Land Company, *supra*, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been received on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See *Campbell vs. Weyerhauser et al* (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,  
First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 4, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 15 day of June, 1912, there was duly filed in said Court, a Demurrer in words and figures as follows, to wit:

**[Demurrer to Amended Bill of Complaint.]**

*In the District Court of the United States for the  
District of Oergon.*

A. D. DANIELS,

Plaintiff,

VS

MARTHA M. CRADDOCK, RUBY I. AUTEN, and  
J. B. AUTEN, her husband, and WILLIAM  
SHIRK,

Defendants.

Comes now the defendants, and not confessing any of the matters in the bill to be true, demur to the amended bill of complaint filed herein, and say:

(1) That said amended bill of complaint does not state any matter of equity entitling the plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle the plaintiff to any relief against these defendants.

(2) That it appears from the said amended bill of complaint herein that this court has no jurisdiction to hear and determine this suit.

(3) That the said amended bill of complaint does not show the timber and stone entry made by the de-



fendant, Martha M. Craddock, August 26, 1910, for the lands mentioned in paragraph 5 of plaintiff's said amended bill of complaint, was ever protested, or that a contest was ever filed against said entry by the plaintiff in the United States Land Office at Lakeview, or that any protest was ever made to the issuance of the final receipt or United States patent upon said entry.

(4) That the plaintiff does not show in his said amended bill of complaint that he ever initiated or acquired a vested right in or to the land that is the subject of this suit, or that he ever acquired such a right or interest thereto as a court of equity will protect.

(5) That it is not shown by said amended bill of complaint that the plaintiff has exhausted his remedy in the Interior Department of the United States prior to the issuance of a patent to the defendants for said lands, in that it is not shown that the plaintiff made any motion for a review or re-review of the decision of the First Assistant Secretary of the Interior, rendered February 15, 1910, (a copy of which is attached to plaintiff's said amended bill of complaint, and, by reference, incorporated in and made a part thereof, and marked Exhibit "A"), which plaintiff was permitted by the rules and procedure in cases before the Interior department to make. Nor is it shown that the plaintiff ever applied to the Honorable Secretary of the Interior for a rehearing of his said decision of February 17, 1910, or that he ever requested the Honorable Secretary of the Interior to exercise the supervisory powers vested in him by the laws of the United States.

(6) That said amended bill of complaint is uncer-

tain and deficient in this, that it does not state the date of the appeal mentioned in paragraph 19 thereof.

(7) That it appears from said amended bill of complaint that the allegation in paragraph 19 thereof that the defendants and others appealed from the decision of the Honorable Commissioner of the General Land Office dated February 13, 1909, is untrue, as to these defendants, since it appears from said amended complaint, in paragraph 8 thereof, that these defendants never made entry or initiated any claim to said land prior to August 26, 1910.

(8) That the amended bill of complaint herein is wholly without equity.

(9) That said amended bill of complaint does not state facts sufficient to constitute a cause of suit.

WHEREFORE, Defendants pray the judgment of this court whether they shall further answer, and that they be dismissed with their costs.

L. F. CONN and  
KING & SAXTON,  
Solicitors for Defendants.

State of Oregon,  
County of Lake.—ss.

I, L. F. Conn one of solicitor for defendants in the above entitled suit, do hereby certify that the foregoing demurrer, in my opinion, is well founded in law.

L. F. CONN,  
Solicitor for Defendant.

State of Oregon,  
County of Lake.—ss.

I, J. B. Auten, one of the defendants in the above en-

titled cause, being first duly sworn, say: That the foregoing demurrer is not interposed for delay.

J. B. AUTEN,

Subscribed and sworn to before me this 10th day of June, 1912.

[Notarial Seal]

L. F. CONN,

Notary Public for Oregon.

[Endorsed]: Demurrer to Amended Bill of Complaint. Filed June 15, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 29 day of July, 1912, the same being the 24 Judicial day of the Regular July 1912 Term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Decree.]

*In the District Court of the United States for the District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs

MARTHA M. CRADDOCK, RUBY I. AUTEN, and  
J. B. AUTEN, her husband, and WILLIAM  
SHIRK,

Defendants.

Now on this 29th day of July, 1912, this cause coming on for a decision upon the defendant's demurrer to plaintiff's amended bill of complaint herein, and the

court having heretofore heard the arguments of counsel for the respective parties thereto thereon, and having taken the same under advisement, and being now fully advised in the premises, finds that the grounds of said demurrer are well taken and that the same should be sustained.

It is, therefore, ordered, adjudged and decreed that the demurrer of the defendants to the amended bill of complaint herein be, and the same hereby is, sustained.

And it further appearing to the court that the plaintiff does not desire to plead further herein;

It is further ordered, adjudged and decreed that this suit be, and the same hereby is, dismissed, and that the defendants have judgment against the plaintiff for their costs and disbursements herein taxed at \$.....

R. S. BEAN,

Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal in words and figures as follows, to wit:

**[Petition for Appeal.]**

*In the District Court of the United States for the  
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs

MARTHA M. CRADDOCK, RUBY I. AUTEN, and  
J. B. AUTEN, her husband, and WILLIAM  
SHIRK,

Defendants.

The above named plaintiff conceived himself aggrieved by the order and decree made and entered in the above entitled cause on the 29th day of July, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt & Hugh Montgomery.

Solicitors for Plaintiff.

HUGH MONTGOMERY,

Of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

**[Assignments of Error.]**

*In the District Court of the United States for the  
District of Oregon.*



A. D. DANIELS, .

Plaintiff,

vs.

MARTHA M. CRADDOCK, RUBY I. AUTEN, and  
J. B. AUTEN, her husband, and WILLIAM  
SHIRK,

Defendants

Now on this 29th day of August, 1912, comes the above named plaintiff A. D. Daniels, appearing by Messrs Platt & Platt, and Hugh Montgomery, his solicitors of record and says that in the record and proceedings of the above entitled Court in the above entitled cause and in the final order and decree entered therein on the 29th day of July, 1912, there is manifest error and that said order and decree is erroneous and against the just rights of said plaintiff and for error the said plaintiff assigns the following:

## I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of Plaintiff's amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in Paragraph VI of plaintiff's amended bill of complaint.

## II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the de-

murrer the forest lieu selection of the plaintiff made upon the lands described in paragraph V of his amended Bill of Complaint was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the defendant, Martha M. Craddock.

### III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the attempted timber and stone entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

### IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government which approval gave the plaintiff a vested interest in the land so selected.

### V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the alleged timber and stone entry of the defendant was made in contravention of the vested rights of the plaintiff herein.

### VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in

that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint, as against the claims of the defendants or any person or persons whomsoever.

#### VII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to have the defendants declared trustees for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

#### VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that the amended bill of complaint stated a good cause of action to which the defendants should be required to file their answer or plea.

#### IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendants.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause and that a decree be entered in accordance with the prayer of

plaintiff's amended bill of complaint.

PLATT & PLATT and HUGH MONTGOMERY,  
Solicitors for Plaintiff.

HUGH MONTGOMERY,  
Of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug. 29,  
1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912,  
there was duly filed in said Court, an Order Allow-  
ing Appeal in words and figures as follows, to wit:

**[Order Allowing Appeal.]**

*In the District Court of the United States for the  
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

MARTHA M. CRADDOCK, RUBY I. AUTEN, and  
J. B. AUTEN, her husband, and WILLIAM  
SHIRK,

Defendants

This day came A. D. Daniels, plaintiff, appearing by  
Messrs. Platt & Platt and Hugh Montgomery, his so-  
licitors of record and presented his petition for an appeal  
and an assignment of errors accompanying the same  
which petition, upon consideration of the court, is hereby  
allowed, and the court allows an appeal to the United  
States Circuit Court of Appeals for the Ninth Judicial

District, upon the filing of a bond in the sum of \$500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,  
Judge.

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal in words and figures as follows, to wit:

**[Bond on Appeal.]**

*In the District Court of the United States for the  
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

MARTHA M. CRADDOCK, RUBY I. AUTEN, and  
J. B. AUTEN, her husband, and WILLIAM  
SHIRK,

Defendants

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity &



Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Martha M. Craddock, Ruby I. Auten, and J. B. Auten, her husband, and William Shirk, in the full and just sum of five hundred (\$500) dollars to be paid to the said Martha M. Craddock, Ruby I. Auten and J. B. Auten, her husband, and William Shirk, their executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents;

Sealed with our seals this 29th day of August, A. D., 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Martha M. Craddock, Ruby I. Auten and J. B. Auten, her husband, and William Shirk, defendants, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Martha M. Craddock, Ruby I. Auten and J. B. Auten, her husband, and William Shirk, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the city of San Francisco in said                      Circuit, on the .....day of September, A. D., 1912, having been served on said defendants.

NOW the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to ef-

fect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. D. DANIELS,

By Platt & Platt,

His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARY-  
LAND,

[Corporate seal]

By Harrison G. Platt,

Attorney in Fact.

By W. J. Clemens,

Agent.

Examined and approved this 29th day of August,  
1912.

R. S. BEAN,

District Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912,  
there was duly filed in said Court, a Citation on  
Appeal in words and figures as follows, to wit:

**[Citation on Appeal.]**

*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

A. D. Daniels,

Appellant,

vs

MARTHA M. CRADDOCK, RUBY I. AUTEN and

J. B. AUTEN, her husband, and WILLIAM  
SHIRK,

Appellees.

United States of America,  
Ninth Judicial Circuit.—ss.

To Martha M. Craddock, Ruby I. Auten and J. B. Auten, her husband, and William Shirk, greeting:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Martha M. Craddock, Ruby I. Auten and J. B. Auten, her husband, and William Shirk, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, state of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the city of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred and twelve.

R. S. BEAN,

Judge of the District Court of the United States, in and  
for the District of Oregon.

United States of America,  
District of Oregon.—ss.

Due service of the within citation to appellees by certified copy thereby as required by law is hereby ac-

knowledge at Portland, Oregon, this 30th day of August, 1912.

KING & SAXTON,  
Of Attorneys for Appellees.

[Endorsed]: Citation to Appellees. Filed Aug. 29, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July 1912, term of said Court; present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Order Enlarging Time to File Record.]**

*In the District Court of the United States for the  
District of Oregon.*

A. D. DANIELS,

Plaintiff,

vs.

MARTHA M. CRADDOCK, et al,

No. 5516.

September, 28, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN,  
Judge.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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A. D. DANIELS,

Appellant,

vs.

MARTHA M. CRADDOCK, RUBY I. AUTEN and  
J. B. AUTEN, her husband and WILLIAM  
SHIRK,

Appellees.

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## BRIEF OF APPELLANT

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Upon Appeal from the United States District  
Court for the District of Oregon

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### STATEMENT OF THE CASE.

On and prior to the 12th day of April, 1902, one Edward B. Perrin and the Aztec Land and Cattle Company, Ltd., a corporation, were each the owners in fee simple, free of any liens or incumbrances, of certain real property located in the Territory of Arizona, and continued to be such owners up until the 2d day of February, 1904. On the 12th



day of April, 1902, these lands were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation issued by the President of the United States. Subsequently and on the 2d day of February, 1904, these parties, acting under and in accordance with the provisions of the Act of Congress passed the 4th day of June, 1897, which Act provided amongst other things that the owners of lands embraced within the limits of a forest reservation might deed back their interests to the United States and select in lieu thereof any unoccupied public land, relinquished and conveyed to the United States their interest in the Arizona land referred to, recorded said deed at the proper office in the county where the land was situated, and on the 8th day of February, 1904, made lieu selections of certain lands situated in the County of Klamath, State of Oregon, which lieu selections were made for the benefit of the appellant in this case. The selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished, immediately prior to the time the deed to the United States was recorded, as required under the rules issued by the Secretary of the Interior of the United States.

Prior to the time that these selections were made and on or about the 28th day of June, 1902, the State of Oregon had filed upon the property

so selected certain instruments purporting to be school indemnity lists, and before the approval of these lists, had sold the land to the appellant in this case. It afterwards developed that the selections so made by the State of Oregon were rejected upon the ground that the base land which the State had tendered in exchange for the land embraced in its school indemnity lists was not proper base land. The appellant in this case had purchased these lands from the State of Oregon in good faith, but found that the State had given him nothing in exchange for the consideration which he paid. For the purpose of protecting his interests thus acquired, the forest lieu selections already referred to, were made.

At the time of making these selections the lieu selectors presented and filed together with their lieu selections, relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists filed as above stated. The Secretary of the Interior had held that the filing of school indemnity lists, regardless of their validity, segregated the lands filed upon from the public domain, and therefore these relinquishments were presented in order to relieve the lands in question from the effect of such segregation.

After the making of these lieu selections and the filing of these relinquishments, the officers of the United States Land Office, located at Lake-

view, Oregon, allowed other entries to be made upon the lands so selected, which entries were in direct conflict with the forest lieu selections so made as above stated. This conflict resulted in several successive appeals to the Interior Department of the United States, which appeals extended over a period of about six years. During the continuance of these appeals and on the 25th day of October, 1905, the Secretary of the Interior directed that the forest lieu selections so made as above stated be allowed as of the date on which they were filed, to-wit: February 8, 1904. This the local officers at Lakeview, Oregon, refused to do on the ground that the lands had been withdrawn for what was known as the Klamath River Project. As a result of this refusal the matter again came before the Secretary of the Interior and on June 26, 1906, he again ordered and directed that the said lieu selections be reinstated. After the making of the order last referred to a petition for a review of the entire proceedings was filed on behalf of an individual by the name of Archie Johnson, a speculator who was trying to procure these lands, which petition was allowed. A rehearing of all the facts took place before the Register and Receiver of the local land office at Lakeview, Oregon, which officers recommended that the forest lieu selections be disallowed and the other entries reinstated. This recommendation of the local officers was refused by the General Land Office on the 13th day of April,

1909, at which time the Commissioner of the General Land Office directed that the forest lieu selections referred to be allowed to remain intact. This last named ruling was taken before the Secretary of the Interior, and on the 17th day of February, 1910, the Secretary of the Interior held that although the forest lieu selections referred to were in all respects regular and should have been allowed when presented, still it was within the competency of the officers of the United States Land Department to dispose of the lands to whomsoever they might choose and that having done so the entries which were in conflict with these forest lieu selections would be allowed and the rights of the lieu selectors, and the appellant in this case, would be denied in all instances where such conflict had occurred.

The appellant having exhausted all the remedies which were available to him in the proceedings before the Land Department waited until a patent to the lands involved was issued to the appellee in this case, and then instituted the present suit to have the appellee, <sup>Martha M. B. Radlock</sup> declared a Trustee of said lands for the appellant, invoking the well-known and well established principle that where the officers of the general government through the application of an erroneous principle of law or a wrong interpretation of a statute, confirm title to public lands to one entryman in an instance where another entryman is lawfully entitled thereto, courts of equity will



intervene and declare the party to whom title has been wrongfully confirmed a Trustee of the party to whom the land rightfully belongs.

On the 19th day of February, 1912, the appellant filed in the District Court of the United States for the District of Oregon, a bill of complaint setting forth the facts substantially as above stated, to which bill of complaint the court sustained a demurrer interposed by the appellee.

Subsequently, and on or about the 4th day of May, 1912, the appellant filed an amended bill of complaint, to which amended bill of complaint the court again sustained a demurrer interposed by the appellee upon the ground that the amended bill of complaint failed to state facts sufficient to constitute a cause of suit. A decree was entered dismissing the case and from this decree an appeal has been perfected.

### **SPECIFICATION OF ERRORS.**

The errors relied upon by the appellant are as follows:

First. The trial court erred in not holding that by the admissions of the demurrer filed by the appellee to the appellant's amended bill of complaint the appellant did on the 8th day of February, 1904, make a valid forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint, and that said forest lieu selection so



made was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the appellee, and in not holding that by the admissions of the demurrer the attempted timber and stone entry of the appellee<sup>Martha M. Braddock</sup> was subsequent in time and inferior in right to the forest lieu selection of the appellant.

Second. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint, in that it did not hold that by the admissions of the demurrer the forest lieu selection of the appellant had been approved by the proper officers of the United States Governemnt, which approval gave the appellant a vested interest in the land so selected against the claim or claims of all persons whomsoever and particularly the appellees

Third. The trial court erred in not holding that by the admissions of the appellee's demurrer the alleged timber and stone entry of the appellee<sup>Martha M. Braddock</sup> was made in contravention of the vested rights of the appellant, and because the trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to be protected in the forest lieu selection, which he had made upon the lands described in Paragraph 5 of his amended bill of complaint as against the claims of the appellee<sup>s</sup> or any persons whomsoever.

Fourth. The trial court erred in sustaining the demurrer to appellant's amended bill of complaint in that it did not hold that by the admissions of the demurrer the appellant was equitably entitled to have the appellees declared ~~X~~ Trustees for the appellant of the lands described in Paragraph 6 of his amended bill of complaint.

Fifth. The trial court erred in sustaining the demurrer to the appellant's amended bill of complaint in that it did not hold that said amended bill of complaint stated a good cause of suit to which the appellees should be required to file <sup>their</sup> ~~her~~ answer or plea, and in decreeing that appellant's amended bill of complaint be dismissed and in allowing costs to the appellees.

Sixth. The trial court erred in not holding that by a proper construction of the Act of Congress of June 4, 1897, the appellant was entitled to have his forest lieu selection of the lands embraced in Paragraph 5 of his amended bill of complaint sustained as against the entry of the appellee <sup>Maria M. O'Raddock</sup> and that by a proper construction of said Act the appellees should be declared ~~X~~ Trustees for the appellant of the lands described in Paragraph 5 of appellant's amended bill of complaint, <sup>Maria M. O'Raddock</sup> which lands were patented to the appellee, all of which matters and things constitute and present a Federal question.

## POINTS AND AUTHORITIES.

### I.

Whenever lands are embraced within a forest reservation pursuant to a proclamation of the President of the United States, the owners of such land might prior to March 3, 1905, select in lieu thereof any vacant unoccupied public land of the United States.

Act of June 4, 1897, 30 Stat. at L. 36; U. S. Comp. Stat. 1901, p. 1541.

### II.

Courts of equity have power to grant relief to an individual aggrieved by the erroneous decision of a legal question by the department officers.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109; 47 Law. Ed. 91, 96.

### III.

If a patent to land to which one is entitled has been improperly issued by the United States to another, the courts will quiet the title of the former or adjudge the other a Trustee of the title for him.

Loney v. Scott, 112 Pac. 172, 175 (Ore. 1910).

Morrow v. Warner Valley Stock Co., 101 Pac. 171, 185 (Ore. 1909).

Lee v. Johnson, 116 U. S. 48, 49; 29 Law. Ed. 570.

Kerns v. Lee, 142 Fed. 985, 988 (C. C. D. Ore. 1906).

Stark v. Starrs, 6 Wall. 402, 419; 18 L. Ed. 925, 930.

Silver v. Ladd, 7 Wall. 219, 228; 19 L. Ed. 139, 141.

Shepley v. Cowan, 91 U. S. 330, 340; 23 L. Ed. 424, 428.

#### IV.

The filing of a lieu selection segregates the land upon which the filing is made from the public domain and cuts off all intervening and subsequent rights as against the lieu selector.

Weyerhauser v. Hoyt, 219 U. S. 380, 388; 55 L. Ed. 258, 261.

Santa Fe Pacific R. R. Co., 41 L. D. 96, 98 (June, 1912).

#### V.

The Act of June 4, 1897, created a standing offer upon the part of the Government to exchange the land within a forest reservation for any unoccupied public land, and this offer once accepted be-

comes a contract between the Secretary of the Interior and the lieu selector.

Roughton v. Knight, 219 U. S. 544; 55 L. Ed. 326, 327.

## VI.

The power of supervision possessed by the officers of the Land Department, to correct or annul entries of land or change their prior rulings or set aside the action of the local land officers is not an unlimited or arbitrary power.

Cornelius v. Kessel, 128 U. S. 456, 461.

Ballinger v. United States ex rel. Frost, 216 U. S. 240, 248; 54 L. Ed. 465, 468.

Peyton v. Desmond, 129 Fed. 1, 9 (C. C. A. Eighth Circuit, 1904).

Howe v. Parker, 190 Fed. 738, 757 (C. C. A. Eighth Circuit, 1911).

## VII.

Under the Act of June 4, 1897, a vested interest is created by the filing of a forest lieu selection.

Olive Land and Development Co. v. Olmstead, 103 Fed. 568, 574 (C. C. Cal., 1900).

## VIII.

The power of approval being a judicial power, imposes upon the Secretary of the Interior the duty



to determine the lawfulness of selections as of the time when the exertion of the authority is invoked by the lawful filing of a selection list.

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387;  
55 L. Ed. 258, 261.

## IX.

If the case made by the plaintiff is one which depends upon the proper construction of an Act of Congress, with a contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States.

Northern Pacific Railroad Company v. Soderberg, 188 U. S. 526, 528; 47 L. Ed. 575, 581.

## X.

It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him.

Lytle v. The State of Arkansas, 9 How. 314, 332.

## ARGUMENT.

The amended bill of complaint filed by the appellant in the case at bar proceeded upon the theory that where the public land officers of the United States Government make an application of an erroneous principle of law or adopt an erroneous construction of a statute in determining the rights of claimants to public land, a court of equity will intervene after the issuance of patent and declare the patentee to be the holder of the land in trust for the party to whom the land should be awarded. This principle has been announced by an almost unbroken line of decisions, and was very concisely and accurately stated by the Supreme Court of the United States in the case of *Lee v. Johnson*, 116 U. S. 48, 49; 29 L. Ed. 570, in which case the following language was employed:

“If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed.”

*Lee v. Johnson*, 116 U. S. 48, 49; 29 L. Ed. 570.

The decision of the Secretary of the Interior Department determining the rights of the respective

claimants to the land involved in the case at bar, is attached to and made a part of the appellant's amended bill of complaint and appears on pages 20 to 33 inclusive of Appellant's Transcript of Record. This decision after setting forth the facts hereinbefore presented in our statement of this case, proceeded to hold that the forest lieu selections of the appellant were in all respects regular and in accordance with the requirements of the rules governing forest lieu selections, and continued as follows:

"It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands. It is thought, however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the department would not be justified in cancelling such entries and filings for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the land department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition."

See *Hoyt v. Weyerhaesuer et al.* (161 Fed. Rep. 324).

Appellant's Transcript of Record, page 32.

The language thus quoted presents in its own words the error which has deprived appellant of his rightful interests. The very case cited in support of this error was afterwards reversed by the Supreme Court of the United States and its decision in this particular will be referred to later. When the Secretary said "That Daniel's application was in all respects regular and might have been allowed when presented," he directly contradicted the previous findings of the very decision in which this language was used. It appears from this decision that the department directed the allowance of these selections on October 25, 1905. (Appellant's Transcript of Record, pages 22, 23.) The same decision also shows that on June 26, 1906, the department again ordered that the lieu selections be reinstated. (Appellant's Transcript of Record, page 25.) Again it appears from the face of the same decision that the General Land Office directed on April 13, 1907, that said lieu selections remain intact. (Appellant's Transcript of Record, page 27.)

The appellant contends that the power of the Land Department to determine the validity of entries or selections is not an arbitrary or unlimited power, and that in the exercise of such power the department is not permitted to dispose of public lands to whomsoever it wishes, but must follow the directions of the law governing the acquisition of such lands and determine whether or not all required acts in connection with the acquisition there-

of have been performed. The appellant further contends that where the Land Department finds all such necessary acts to have been performed in connection with a selection of public land in lieu of land included within the limits of a forest reservation, as provided by the Act of June 4, 1897, and has once approved such a selection, that the said department can not thereafter disallow such selection in favor of a right which was subsequent in time to the right first initiated.

The Act referred to provides among other things as follows:

“That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.”

Act of June 4, 1897, 30 Stat. at L. 36; Vol. 2, U. S. Comp. Stat. 1901, p. 1541.

Appellant's Transcript of Record, page 4.

The above Act was construed by the Circuit Court of the United States for the Southern District



of California in the case of Olive Land and Development Co. v. Olmstead, 103 Fed. 568, in which case his honor, Judge Ross, held that a mere filing of a forest lieu selection created a vested interest in the lands selected without reference to the approval of any Land Department officer. The language used in this particular was as follows:

“And, turning to the act under consideration, it is seen, and as has already been observed, that the power to ‘select’ is by the statute given to the party who is invited to make the exchange, provided always that he confines his selection to the class of lands described in the statute, to-wit: Those vacant and open to settlement. No other condition is imposed by the statute. The act in question differs very materially in this respect from the indemnity clauses of many of the railroad and other grants, requiring the selections to be made by and with the advice, consent, direction or approval of some officer of the land department, in which case such consent or approval is deemed a condition precedent to the vesting of any interest in the selected land.”

Olive Land and Development Co. v. Olmstead,  
103 Fed. 568, 574 (C. C. Cal., 1900).

The appellant, relying upon the language of this case, argued in the court below that the mere filing of his forest lieu selection created in him a vested interest in the land selected as against all others, without reference to the approval of the Interior Department, and that said department could only disapprove his selection for failure to comply with the requirements of the statute, such as his inability

to show good title to the land relinquished, or to establish that the land selected was public, unoccupied, non-mineral land, free and open to entry. The trial court, however, held that the case of *Olive Land and Development Co. v. Olmstead* was now of no force and effect for the reason that Judge Ross in the case of *Cosmos Exploration Company v. Gray Eagle Oil Company*, 104 Fed. 20, 34, had explained that the case of *Olive Land and Development Co. v. Olmstead*, 103 Fed. 568, had been decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the Act of June 4, 1897, and for the further reason that the Supreme Court of the United States in the same case of *Cosmos Exploration Company v. Gray Eagle Oil Company*, 190 U. S. 301, 312; 47 L. Ed. 1064, 1072, had held that the mere filing of papers was not sufficient to create an equitable title and that a decision as to the validity of the filing was necessary.

(See opinion of trial court, pages 23, 24, Appellant's Transcript of Record, in *Case of Daniels v. Wagner*, No. 2217.)

The Supreme Court of the United States, in the case last referred to, used the following language:

"There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the

statute, and the selector cannot decide the question for himself."

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, 312; 47 L. Ed. 1064, 1072.

The language last quoted presents nothing which is in conflict with the holding of Judge Ross in the case of Olive Land and Development Co. v. Olmsted, 103 Fed. 568, 574. The holding of Judge Ross was merely to the effect that the filing of a forest lieu selection initiated a vested right and created a vested interest. He did not hold, however, that such a right could be initiated and such an interest created by the mere filing of papers. The case contemplated that the selector must file the proper kind of papers and select the proper kind of land. These questions must, of course, be determined by the officers of the Land Department, and these very questions were determined in favor of the appellant in the case at bar, as shown by the allegations of his amended bill of complaint, which allegations are admitted by the appellee's demurrer. It is not claimed that the mere making of a lieu selection creates a complete equitable title, but it is claimed that the filing of such a selection segregates the land selected from the public domain and initiates a vested right and creates a vested interest which may ripen into a complete equitable title, when it is finally determined that the selection is in all respects regular.

Furthermore, the language quoted from the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301; 47 L. Ed. 1064, 1072, was mere dicta in the case then before the court, and the real question decided was that in the case then under consideration, no decision whatsoever had been made by the Land Department with reference to the validity of the selection there made. The following language establishes this conclusion:

“Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished has never been decided by the land department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such questions themselves.”

*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 315; 47 L. Ed. 1064, 1073.

What application can the principles of law as applied to the facts before the court in the case last cited have with reference to the facts of the case at bar, wherein it is admitted that the selections of the appellant were in all respects regular, and such facts had been so determined by the Secretary of the Interior? We venture also to assert that no language can be found in the case of *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301; 47 L. Ed. 1064, which in any manner contravenes or contradicts the doctrine announced by Judge Ross in the case of *Olive Land and De-*



velopment Co. v. Olmstead, 103 Fed. 568, 574, holding that the filing of a forest lieu selection initiates a vested right and creates a vested interest, as against all subsequent entries without regard to the approval of the Land Department.

It has also been many times held that even in instances where the approval is necessary, such power of approval is neither arbitrary nor unlimited and can not be exercised without regard to established principles of law. This very rule was announced by the Circuit Court of Appeals for the Sixth Circuit, speaking through Mr. Justice Van Devanter. The case referred to holds as follows:

“But the power of the land department to review its prior holdings and to cancel existing entries is not unlimited or arbitrary.”

(Citing *Cornelius v. Kessel*, 128 U. S. 456; 32 L. Ed. 482.)

*Peyton v. Desmond*, 129 Fed. 1, 9 (C. C. A., Eighth Circuit, 1904).

Again:

“Neither the general jurisdiction nor the supervisory power of the commissioner or of the secretary is arbitrary or unlimited. The effective exercise of each is conditioned by established rules of law. The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order and the uniform application of the established



rules and practice of the department to all litigants alike are as essential to the administration of justice in the land department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi-judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles of claimants to lands under the acts of Congress may not be annulled by the land department in violation of its settled practice or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard."

Howe v. Parker, 190 Fed. 738, 757 (C. C. A., Eighth Circuit, 1911).

As already shown by a reference to the decision of the Secretary of the Interior attached to the appellant's amended bill of complaint, he arbitrarily held that regardless of the regularity of the appellant's application and regardless of the unfortunate action of the local land office in allowing subsequent entries to be made, the Land Department would not cancel those entries for the mere purpose of protecting the equities of Daniels. This was one of those special cases referred to in the decision last cited where established rules and decisions were ignored at the arbitrary will of the presiding officer and the admitted equities of the appellant brushed aside by a mere stroke of the pen, and this appellant is here now asking this court whether or not such equitable titles as his can be thus an-

nulled in direct violation of even that most elementary principle that "first in time is first in right," assuming other equities to be equal. Not only was the appellant first in time, but he was likewise first in all other things save in receiving the proper protection of his vested interests.

Regardless, however, of the question whether or not under the provisions of the forest lieu selection act above cited the approval of the Land Department is necessary in order to create a vested interest, and regardless of whether or not that very department can exercise its own wayward will in determining the matters before it, and regardless of whether it can three times approve a selection and then arbitrarily review its prior rulings and cancel entries confirmed thereunder, nevertheless, it has been held that even in those instances where the requisite of approval has been made a condition precedent to the vesting of any interest by the very statute giving the right, the initiation of that right is sufficient to give it validity as against all others by virtue of its being first in time. This principle was announced by the Supreme Court of the United States in the very recent case of *Weyerhaeuser v. Hoyt*, 219 U. S. 380; 55 L. Ed. 258. In this case a lieu selection had been made by the Northern Pacific Railway under and in accordance with the provisions of the Act of July 2, 1864 (13 Stat. at L. 365, 367, Chap. 217), and the joint resolution of May 31, 1870, 16 St. at L. 378, and before

the approval of this selection, but subsequent to its filing, an application was made to purchase the land under the Timber and Stone Act. The selection of the Railroad Company was afterwards approved and patent issued thereon. A suit was instituted for the purpose of having the Railroad Company declared a Trustee of the legal title for the timber and stone entryman upon the theory that prior to the time when the Interior Department approved the selection of the railroad, the land was open and subject to entry by any qualified entryman. This view of the law was adopted by the Circuit Court of Appeals for the Eighth Circuit wherein it held that no equitable right was acquired under and by virtue of an indemnity selection until its approval by the Secretary of the Interior. The decision of the Circuit Court of Appeals is reported in 161 Fed. 324, and is the same decision referred to in the final adjudication of the Secretary of the Interior in the case at bar set forth on pages 20 to 33 inclusive of appellant's Transcript of Record, and is found in the same portion of the Secretary's opinion cited above, wherein he held that it was within the competency of the officers of the Land Department to allow other entries, regardless of the rights or equities of Daniels acquired under and by virtue of his lieu selection.

The Supreme Court of the United States in reversing the Circuit Court of Appeals, determined as follows:

“It is beyond dispute on the face of the granting act of July 2, 1864, C. 217, 13 Stat. at L. 365, 367, and of the joint resolution of May 31, 1870, C. 67, 16 Stat. at L. 578, extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that, as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company, subject to the approval of the Secretary of the Interior, that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of the power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection is not only theoretically apparent from the mere statement of the proposition, but has, moreover, in actual experience been found to be the practical result of carrying that doctrine into effect. See 25 Opin. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view, a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection, when made, should not include lands which at that time were



subject to the rights of others. The requirement of approval by the secretary consequently imposed on that official the duty of determining whether selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending action of the secretary. The scope of the power to approve lists of selections, conferred on the secretary, was clearly pointed out in *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. Ed. 687, 694, 10 Sup. Ct. Rep. 341, where it was said that the power to approve was judicial in its nature. Possessing that attribute, the authority therefore involved not only the power, but implied the duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior was to bring into play the elementary principle of relation, repeatedly sanctioned by this court and uniformly applied by the land department from the beginning up to this time, under similar circumstances, in the practical execution of the land laws of the United States. Without attempting to cite the many cases in this court illustrating and applying the doctrine, a few only which are aptly pertinent and here decisive are referred to. *Gibson v. Chouteau*, 13 Wall. 92, 100, 20 L. Ed. 534, 536; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 733, 28 L. Ed. 872, 877, 5 Sup. Ct. Rep. 334; *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 112, 47 L. Ed. 726, 730, 23 Sup. Ct. Rep. 615; *United States v. Detroit Lumber Co.*, 200 U.



S. 321, 334, 50 L. Ed. 499, 504, 26 Sup. Ct. Rep. 282, and cases cited.

“In *Shepley v. Cowan* there was conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state a large quantity of land to be selected by the governor, the act providing that if the selection should be approved by the Secretary of the Interior, patents were to issue. The court said (p. 337):

“‘The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.’

“On page 338, after distinguishing *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, and *Yosemite Valley Case* (*Hutchings v. Low*), 15 Wall. 77, 21 L. Ed. 82, the court said:

“‘But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.’

In *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 28 L. Ed. 872, 5 Sup. Ct. Rep. 334, one of

the questions arising for decision was which of two railroad companies was entitled to certain tracts of lieu lands situated within overlapping indemnity limits of certain grants made by an act of Congress to the territory of Minnesota to aid in the construction of the roads of the contesting companies. The selections were to be made by the governor, and required the approval of the Secretary of the Interior. The Winona Company filed a list of selections. The St. Paul Company made no selections, but nevertheless, on grounds which need not be stated, the Secretary of the Interior certified the lands to the state for the use of that company. The Winona Company brought suit in the state court to have a declaration of its rights in the land and to restrain the St. Paul Company and others from receiving a patent or other evidence of title to the lands from the governor of the state. The state court decreed in favor of the Winona Company, and this court affirmed its action. In the course of the opinion it was said (page 731):

“The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant or of lands which, for other reasons, are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road.’

“After referring to prior decisions the conclusion was reached that, as to the lands to be selected, ‘priority of selection secures priority of right;’ and that as the Winona Company alone had made selection of the lands, and that selection was lawful, the right to the land as against third parties vested in the Winona Company as of the date of the filing of its lists of selections. In concluding the opinion it was said (page 733):

“It is no answer to this to say that the Secretary of the Interior certified these lands to the state for the use

of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for lieu lands or for the extended grant of 1864, out of any odd sections within 20 miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. *Johnson v. Towsley*, 13 Wall. 72, 80, 20 L. Ed. 485, 486; *Gilson v. Chouteau*, 13 Wall. 92, 102, 20 L. Ed. 534, 537; *Shepley v. Cowan*, 91 U. S. 330, 340, 23 L. Ed. 424, 427; *Moore v. Robbins*, 96 U. S. 530, 536, 24 L. Ed. 848, 851.' So, also, in *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 47 L. Ed. 726, 23 Sup. Ct. Rep. 615, the court said (page 112):

“Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limit—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class the company acquires no interest in any specific sections until a selection is made with the approval of the land department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make.’

“The doctrine thus affirmatively established by this court, as we have said, has been the rule applied by the land department in the practical execution of land grants from the beginning. *Porter v. Landrum*, 31 Land Dec. 352; *Re Southern P. R. Co.*, 32 Land Dec. 51; *Re Santa Fe P. R. Co.*, 33 Land Dec. 161; *Eaton v. Northern P. R. Co.*, 33 Land Dec. 426; *Santa Fe P. R. Co. v. Northern P. R. Co.*, 37 Land Dec. 669. The well settled rule

of the land department on the subject was thus stated by the then assistant attorney general in the department, now Mr. Justice Van Devanter, as follows:

“Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

“There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

“What effect has been given to a pending railroad indemnity selection?

“Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. *Dinwiddie v. Florida R. & Nav. Co.*, 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact a railroad



indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws.' (32 Land Dec. 53.)

"Despite the doctrine of this court, as expounded in the cases previously referred to, the unbroken practice of the land department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land grant acts which would result from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is *Sjoli v. Dreschel*, 199 U. S. 564, to which we have previously referred, and others are cited in the margin.

"What we have already said as to the *Sjoli* case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration, nor even by way of obiter was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes: (a) those involving the nature and character of the right, if any, to indemnity lands prior to selection; (b) whether such lands, after the filing of a list of selections and before action by the Secretary of the Interior thereon, could be taxed by a state to the railroad company as the owner thereof; and (c) those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts were done before the filing of the list of selections. In none of the cases, moreover, was



the well settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred, expounding the doctrine of relation, were approvingly cited or expressly reaffirmed.

“The Sjoli case, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which, when separated from its context and disassociated from the issues which the case involves, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in *Cohen v. Virginia*, 6 Wheat. 399, 5 L. Ed. 290, so often since reiterated and expounded by this court, to the effect that ‘general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.’ The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval by the Secretary of the Interior of a lawful list of selections. That the general expressions in the Sjoli case are not persuasive here clearly results from the demonstration which we have previously made, that to apply them would be in effect to destroy the indemnity provisions of the granting act. Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the Sjoli case as persuasive is clear (a) because to do so would result in the overthrow of the uniform rule by which the land department has administered land grants from the beginning—a rule continued in force

after the decision in the Sjoli case because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Ops. Atty. Gen. 632); (b) because of the destructive effect upon rights of property and the infinite confusion which would now arise from extending, under the circumstances stated, the observations in the Sjoli case to the wholly different state of facts presented upon this record."

Weyerhaeuser v. Hoyt, 219 U. S. 380, 387; 55  
L. Ed. 258, 261-264.

The opinion just quoted proceeds upon the theory that it appears from the face of the granting act and joint resolution therein referred to, that Congress intended to confer upon the lieu selector a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. That portion of said Act which relates to the right of selection provides as follows:

"And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior."

13 Stat. at L. 365, 367, 368.

The language of the Act which is now before this court for construction in the present case provides in part as follows:

"That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within

the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement."

30 Stat. at L., 36, Chap. 2, U. S. Comp. Stat.  
1901, p. 1541.

The only essential difference between these two provisions is that in the case of a railroad selection the statute requires the approval of the Secretary. This brings all suits arising under and in accordance with the provisions of the forest lieu selection act within direct range of the doctrine announced and the principles laid down in the case of *Weyerhaeuser v. Hoyt*, 219, U. S. 380, above cited. This very contention was supported by the Interior Department itself in the recent case of *Santa Fe Pacific Railroad Co.*, 41 L. D. 96, 98. In said case the First Assistant Secretary held as follows:

"The state relies largely upon the language found in the case of *Sjoli v. Dreschel* (199 U. S. 564), but without giving extended consideration thereto it is sufficient to say that said decision was explained and distinguished in the more recent case of *Weyerhaeuser v. Hoyt* (219 U. S. 380), and from the latter decision it may be fairly deduced that a selection requiring departmental approval is from the date of its filing an appropriation of the land selected, and that when approval is given its relation is of the time of its filing."

*Santa Fe Pacific Railroad Co.*, 41 L. D. 96, 98  
(June, 1912).

Even, therefore, if the court should read into the statute of June 4, 1897, the requisite of departmental approval as a condition to the vesting of any interest, nevertheless under the decision last cited, the land selected is segregated from the public domain and is therefore not open to entry pending such approval or disapproval, and it is admitted in the case at bar that the entry of the appellee, <sup>Martha M. Brudt</sup> was ~~made long before the final decision of the Interior~~ made long after the making of Daniels' lieu selection.

As above stated, the case of Weyerhaeuser v. Hoyt proceeds upon the theory that Congress intended to confer upon the Railroad Company a substantial right to select land within the indemnity limits in lieu of lands lost within the place limits. Does the Act of June 4, 1897, which Act is presented for consideration at this time, purport to confer such a substantial right? To hold otherwise would be to render the statute itself meaningless, and would in the language of Chief Justice White in the Weyerhaeuser case above cited not only "destroy the right which it was the purpose of Congress to confer," but would also "be destructive of the right of selection."

In order to combat the clear, lucid and elementary principles laid down in the case of Weyerhaeuser v. Hoyt above cited, and to avoid, if possible, the application of those principles to the

case at bar, it was argued upon the hearing and maintained by the court that the objects, purposes and results contemplated by the Act of June 4, 1897, were entirely different from the objects, purposes and results contemplated by the granting act and joint resolution presented for consideration in the case of *Weyerhaeuser v. Hoyt*. It was contended and held that the act involved in the latter case amounted to a grant and that the right of selection therein given was in exchange for a vested right of which the railroad had been deprived, while on the other hand the Act of June 4, 1897, was a mere standing offer upon the part of the Government to give to the owner of lands included within the limits of a forest reservation the right to select other land in lieu thereof, the selector not being deprived, however, of any vested right for the reason that he was under no obligation to select land elsewhere and could continue if he so desired to possess his holdings within the forest reservation; and that since the right of selection was in the nature of a contract offer, the Government could accept or reject the offer at its will.

The fallacy of this theory as formulated is shown by its mere enunciation.

In the first place, the distinction which the theory attempts to support is negatived by the very holdings made in the case of *Weyerhaeuser v. Hoyt*. In that case Justice White, referring to the earlier decision of *Oregon & California Railroad Co.*



v. United States, 189 U. S. 103, 112; 47 L. Ed. 726, 731, for the purpose of determining the inherent character of a selection made under the Act there presented for consideration, adopted the following quotation:

“Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd numbered sections within its place or granted limits, which interest relates back to the date of the granting act, the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the land department, and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make.”

Weyerhaeuser v. Hoyt, 219 U. S. 380, 391; 55 L. Ed. 258, 263.

It is apparent from the language last quoted, that the right of selection conferred upon the Railroad Company was not only not a grant, but that it did not rise even to the dignity of a contractual relation, which according to the contention of the solicitors for the appellee and of the trial court, was conferred by the Act of Congress of June 4, 1897, giving to the owner of lands within a forest reservation the contract right to select any other public land in lieu thereof. The language above quoted holds expressly that up until the date of selection the Railroad Company acquired no interest

whatsoever in the selected land, and so free was such land from any individual interest whatsoever, that prior to a selection the Government could make any disposition of the land which it might see fit. Furthermore, the very language quoted points this out as a basic distinction between lands within indemnity limits and lands within place limits. How, then, can it be logically argued for a single moment that under the acts presented for consideration in the case of *Weyerhaeuser v. Hoyt*, the Railroad Company acquired any higher or better rights of selection than the owner of forest reservation land acquires under the Act of June 4, 1897!

Indeed, it is very apparent that Congress has bestowed upon the owner of land within a forest reservation a greater right to the lieu land than was conferred upon the Railroad Company by the act construed in the case of *Weyerhaeuser v. Hoyt* above cited, because the very contention which the solicitor for the appellee urged in attempting to distinguish the case of *Weyerhaeuser v. Hoyt* from the present case, admits that from the date of selection a contractual relation is established between such an owner of land within a forest reservation and the United States Government.

Furthermore, the Railroad Company acquired absolutely no interest in lands granted, which had been otherwise reserved, sold or granted prior to the railroad grant, for the reason that these prior sales made it impossible for any title to said por-

tions of the land to vest in the Railroad Company. It therefore follows that the Railroad Company had been deprived of no vested right, while on the contrary the owner of land within a forest reservation had at least been constructively deprived of a vested interest, by virtue of the act which enclosed his land within the limits of a forest reservation.

In the second place, if the contention urged by the appellee and sustained by the court, to the effect that the statute of June 4, 1897, constitutes a standing offer on the part of the Government to give land in exchange for land embraced within a reservation, then it follows that whenever this offer is accepted by virtue of a selection there is immediately created a vested right, of which the selector can not be deprived unless perchance he has failed to conform to some one of the conditions precedent which must accompany his acceptance of the outstanding offer. This latter proposition is supported by a decision of the Supreme Court of the United States in the case of *Roughton v. Knight*, 219 U. S. 537. Justice Lurton quoting from the Secretary of the Interior, used the following language in the case last referred to:

“No contract arises until a selection is made and the conveyance of the base tract filed in the land department. Under the Act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the ex-

change. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

Roughton v. Knight, 219 U. S. 537, 548; 55 L. Ed. 326, 328.

If, therefore, it be held that the Act of June, 4, 1897, does not in itself constitute a grant of lands without a reservation in lieu of lands included therein, but is on the contrary an open standing offer on the part of the Government constituting a contractual relation, then the moment this offer is accepted a right is initiated, the offer and acceptance are complete, and it only remains for the officer upon whom the duty devolves, to determine whether or not the selection is in all respects regular. It is admitted in the case at bar that a deed to the land within the forest reservation was made and executed. It is further admitted that an abstract of title showing the grantor to be the owner in fee simple of the land so deeded was presented, together with the deed. It is further admitted that a forest lieu selection of the lands in controversy in this case was made. It is further admitted from the face of the amended pleading as is shown by the decision of the Secretary of the Interior, as well as by the three respective acts of approval of these selections by the Land Department, that the selection was in all respects regular. In face of these admitted facts, how can it be argued that the individual who is first in right in all particulars can

be deprived of that right! As was said by the Secretary of the interior himself:

“It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the secretary had been carried out it would have been done before the case became complicated by the counter equitable considerations arising upon the unfortunate allowance of the homestead and timber and stone entries for most of these lands.”

Appellant's Transcript of Record, page 32.

Daniels did all that he could do. He accepted the offer presented by the statute. He conformed to the requirements of the Secretary of the Interior. He did all that he was able to do, but because of the **“unfortunate”** action of the governmental officers he is to be deprived of all his rights. Fortunately, however, this is contrary to the well established principles of law long ago announced by the highest tribunal in the land:

“It is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to obtain his right by the misconduct or neglect of a public officer, the law will protect him.”

Lytle v. The State of Arkansas, 9 How. 314,  
332.

In the third place, the intention of Congress as evidenced by an amendment to the Act of June 4, 1897, as well as the reasons which led to the passage



of the Act clearly establish that it was the intention of Congress to confer upon the owner of land embraced within a forest reservation, a substantial right to select other unoccupied public land in lieu of the land so included. This makes the present case one wherein each and every principle announced in the case of *Weyerhaeuser v. Hoyt* above cited should be applied. If these principles are so applied then it will have to be admitted that every question in the case at bar has already been determined by the court of last resort.

The Act of June 4, 1897, was amended in 1900, which amendment provides that the selections contemplated by the Act:

“Shall be confined to vacant, surveyed, non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent; provided, that nothing herein contained shall be construed to affect the rights of those who, previous to October 1, 1900, shall have delivered to the United States deeds for lands within forest reservations and made application for specific tracts of lands in lieu thereof.”

31 Stat. at L. 614.

The proviso just cited states in language which possesses no semblance of ambiguity, that the execution of the deed and the making of a selection creates a substantial right. To hold otherwise, would be to render the provision meaningless.

Again, the Act of Congress which repealed the

Act of June 4, 1897, contained the following proviso:

“Provided, that selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issued therefor the same as though this act had not been passed; and if for any reason not the fault of the party making the same any pending selection is held invalid, another selection for a like quantity of land may be made in lieu thereof.”

33 Stat. at L. 1264, Chap. 1495; U. S. Comp. Stats. Supp., 1909, p. 581.

This proviso merely confirms the intention of Congress to confer a substantial right and needs no comment.

If no such proviso existed, however, and we were left entirely dependent upon the Act of June 4, 1897, itself, it is clearly apparent from the face of the Act that Congress intended to confer upon the owners of land included within a forest reservation a substantial right to select other unoccupied public land in lieu thereof. The reasons for the passage of this forest lieu selection act were very clearly elucidated and expounded by Mr. Justice Lurton in the recent case of *Roughton v. Knight*, 219 U. S. 537.

In this connection we direct the court's attention to the following language of the learned Justice:

“Upon its face the act is neither more nor less than a proposal by the government for an exchange of claims

to land unperfected, or lands held under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere. The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his lands before the creation of a reservation in the public lands surrounding him. He was thereby isolated from neighborhood association and deprived of the advantage of schools, churches and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes."

Roughton v. Knight, 219 U. S. 537, 546; 55 L. Ed. 326, 327.

As already stated, it was argued at the hearing of the demurrer to appellant's amended bill of complaint that the owner of land within a forest reservation was under no obligation to accept the offer covered by the Act of June 4, 1897, and could continue, if he so desired, to remain in ownership and possession of his land regardless of its inclusion within a forest reservation. Carrying this argument to its ultimate conclusion, it was contended that the holder of such reservation land was not therefore deprived of any vested right, and that the action of the Secretary of the Interior, with reference to the acceptance or rejection of an application for lieu land was an arbitrary power vested in him by law to be exercised at will; and he could bestow upon the lieu selector, if he so desired the gratuity which the Government offered by virtue of the Act of June 4, 1897. Whether Congress by virtue of the

Act of June 4, 1897, proposed to bestow upon the owner of lands within a forest reservation a mere gift or gratuity or whether it intended to confer upon him a substantial right of some kind is the vital question in this case.

If a gratuity was contemplated, however, then the Act of June 4, 1897, is a useless statute. It is merely an incumbrance upon our books. For if a gratuity was contemplated and the Secretary of the Interior was vested with the role of a Santa Claus to present this gratuity or withhold it at his will, the Government would merely have had to proceed with the creation of forest reservations and bestow the right of selection on those only who invited and invoked its sympathy. If the Government intended to relieve those only, whom the Secretary should designate, then it need not have passed the Act of June 4, 1897.

To argue that an individual who is deprived of a proper and adequate use of his land, but still possesses the land, has thereby lost nothing, is to argue that since matter is indestructible, the man whose house has been destroyed by fire has lost nothing, because he still possesses all of its original elements in the form of ashes.

The very fact that Congress passed and put into effect the Act of June 4, 1897, establishes beyond any possible doubt its own recognition of the deprivation which would result to an owner of land within a forest reservation, and its intention to

grant him in lieu thereof not a vague, mythical, inchoate right to obtain land elsewhere, but a definite, fixed and substantial right to select any other land which might be open to entry. Congress, of course, realized the isolation which would result from the barrier of a forest reservation. The deprivation of schools, churches, occupation and association by others and of all things which tend to give value to land, must inevitably follow the creation of such a barrier. It is a matter of common knowledge of which all courts will take judicial notice that many a tract of land within close range of a densely populated city, is valueless because of its inaccessibility. To deprive an individual of the value and use of his land is a greater deprivation than to deprive him of the land itself. In the latter instance he is deprived of the naked commodity, but no obligations flow from the deprivation, while in the first instance he still possesses the commodity, but has in addition thereto the constant expense of repair, keep and taxes.

It is therefore the contention of the appellant that the Act of June 4, 1897, conferred upon all owners of lands within forest reservations a substantial right to select in lieu of the land of which they were deprived any vacant, unoccupied land within the public domain, and that when, as in the case at bar, a selection of the lieu land has once been made, there is thereby initiated a right and interest of which the selector can not thereafter



be deprived save by his own failure to conform to the requirements of the statute from which this right emanated; that from the date of the initiation of this right the land over which the right has been exercised is thereby segregated from the public domain to the exclusion of all other interests pending the decision of the governmental officer in whom is vested the power of approval or rejection, if such approval is necessary; that when such power of approval or rejection is once invoked he is bound to determine not whether the lieu selector should be given a preference over a subsequent entryman, but whether the lieu selector has in all respects conformed to the law, for as stated by Mr. Justice White in the case of *Weyerhaeuser v. Hoyt*:

“The requirement of approval by the secretary consequently imposed on that official the duty of determining whether the selections were lawful at the time they were made, which is inconsistent with the theory that any one could appropriate the selected land pending the action of the secretary.”

*Weyerhaeuser v. Hoyt*, 219 U. S. 380, 388;  
55 L. Ed. 258, 261.

The language last quoted is directly in conflict with the following language of the Secretary upon which the appellee's entire title is based:

“It is believed that these applications might have been allowed not as a matter of right but in the discretion of the Secretary of the Interior, and if the instructions of the secretary had been carried out it would have been done.” \* \* \*

Appellant's Transcript of Record, page 59.

Furthermore, the Secretary's final holding in this particular was not only in direct conflict with the holding of the Supreme Court as just cited, but in direct conflict with his own prior holdings and rulings in approving the selections in question upon two different occasions.

The question to be determined in this case presents not only a far reaching proposition involving thousands of acres of the public land, but presents in addition a Federal question, such as to warrant an appeal to the Supreme Court of the United States. As above stated, the determination of the rights here involved depend upon whether or not the Act of June 4, 1897, confers a substantial right. A construction of this Act, which would support the contention of the appellant that the statute does confer a substantial right to select lands in lieu of lands lost within a forest reservation, would sustain the right of the appellant to maintain the present suit, and on the other hand a construction of the same Act to the effect, as maintained by the Secretary of the Interior, that under it the allowance of a selection is within his discretion, would defeat the present suit. Under such circumstances it is held that a Federal question is presented:

"If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Doolan v. Carr*,

125 U. S. 618 (31 L. Ed. 844); *Cooke v. Avery*, 147 U. S. 375 (37 L. Ed. 209)."

*Northern Pacific Railroad Company v. Soderberg*, 188 U. S. 526, 528; 47 L. Ed. 575, 581.

The few cases in which this question is now presented to this court for determination, constitute but a very small part of the instances wherein the same difficulty has arisen throughout the entire United States. The injury which the appellant in this case has suffered is undoubtedly very small in comparison to the injuries which have been suffered by many poor people whose entries have been embraced within forest reservations. The trial court in the case at bar in his endeavor to distinguish the doctrine laid down in the case of *Lytle v. State of Arkansas* above cited, to the effect that whenever an individual in the prosecution of a right has conformed to all the requirements of the law, he should not be deprived of his rights by virtue of the erroneous action of any governmental officer, argued that this doctrine applied only in cases of homestead and pre-emption entries, upon the theory that the government had always been tender as regards the rights of such entrymen. (Transcript of Record, page 21, in *Case of Daniels v. Wagner*, No. 2217.)

Such argument limits itself to the narrow confines of the present cases. The effect of the ruling to be here announced and the construction to be adopted cannot be limited to this appellant. Simply because there is nothing in the present case to

show that this appellant made a homestead entry on the base lands involved in this case does not go to prove for a single moment that many homestead entries have not been made upon lands which are now embraced within forest reservations. Furthermore, there is nothing in the present case to show that the forest reservation land here involved was not originally taken up as a homestead entry. It therefore logically follows that in the determination of the question here involved it is, theoretically at least, homesteader against homesteader, and such being the case how can it be logically argued or legitimately held that the rule which protects the homesteader in one instance, where he has been deprived of rights which he has legitimately earned by conforming to the law, should not be applied in other instances where he has lost a vested right?

It is indeed a sad spectacle to travel through a forest reservation and see a few isolated homesteaders who have made their entries in hopes of future increases in value by virtue of neighborhood associations, now entirely cut off not only from associations contemplated but from all associations. To allow the rule of law which has been adopted in this case to remain in effect is to hold that many of these unfortunate entrymen, whose rights have been thus jeopardized and whose future has been blighted, can only obtain relief as the arbitrary will of the Interior Department may direct, regardless



of the act of Congress in passing a statute for their protection.

In fact, to confirm the decree in the present case is to hold that the owner of land within a forest reservation who has deeded his interest back to the United States under and in accordance with the provisions of the act of June 4, 1897, can, if the Secretary of the Interior so desires, be prevented from ever selecting any other public land in lieu of that which he has deeded to the government. He might attempt to make a selection today which the secretary could deny tomorrow, and so on without end. The opportunity which this would open for the juggling of such rights is a fact which becomes apparent by merely attempting to put into practice the doctrine which the decree of the lower court establishes. It may be that such a case is an isolated and extreme one, but by such extreme cases the practical effect of a ruling may be oftentimes best tested.

It may be contended that these observations are not applicable to the case at bar, but courts whose decisions are of such far-reaching effect as are the holdings of this court, must take such matters into consideration in adopting and laying down a rule of property which is to affect so many individuals, as will be affected by the decision which is to be rendered herein.

In view of these considerations and in view of the further consideration that the question here pre-



sented is clearly a federal question, we respectfully urge that these questions and propositions of law be certified by this court to the Supreme Court of the United States as provided by section 239 of the Act of March 3, 1911, 36 Stat. at L. 1157.

Respectfully submitted,

PLATT & PLATT,

Solicitors for Appellant.

3  
No. 2227

**United States Circuit Court  
of Appeals  
For the Ninth Circuit**

---

A. D. DANIELS,

Appellant,

vs.

MARTHA M. CRADDOCK, RUBY I.

AUTEN and J. B. AUTEN, her husband, and WILLIAM SHIRK,

Appellees.

---

**BRIEF OF APPELLEES.**

---

**Appeal From the United States District Court for  
the District of Oregon.**

PLATT & PLATT,

Solicitors for Appellant.

L. F. CONN, and

KING & SAXTON,

Solicitors for Appellees.

## STATEMENT OF CASE.

This is a suit instituted by the appellant in the District Court of the United States for the District of Oregon, against the appellees, whereby the appellant seeks to have the appellee, Martha M. Craddock, declared to hold the title to certain lands in trust for the appellant.

Appellant's bill of complaint sets out the relevant circumstances connected with his cause of suit as he conceives them, and appellees' demurrer to said bill of complaint admits the facts alleged therein.

The demurrer to the bill of complaint having been sustained, a decree of dismissal was entered from which complainant appeals.

In paragraph XVIII of the amended bill of complaint (page 14 of transcript of record) it is alleged that appellee, Martha M. Craddock, made entry for the land in controversy on August 26, 1910, which is evidently an error on the part of the pleader as to the date, for it is alleged in the next paragraph (XIX) that subsequently said Martha M. Craddock joined in an appeal to the Secretary of the Interior and the opinion of Hon. Frank Pierce, First Assistant Secretary, rendered on said appeal, was dated Feb. 17, 1910 (page 20 of transcript of record).

## POINTS AND AUTHORITIES.

### I.

At most, the Act of June 4, 1897, constitutes but an offer upon the part of the government to exchange any of its "vacant land, open to settlement" for an equal area of patented land in a forest reservation.

### II.

The Land Department has power and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation, and the selection of other lands in lieu thereof, of which the courts will take judicial knowledge.

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; 23 Sup. Ct. 692; 47 Law ed. 1064.

### III.

"That a proposal to exchange land within a forest reservation for lands outside may be withdrawn before acceptance is an obvious proposition."

Roughton vs. Knight, 219 U. S. 544, 55 Law ed. 326, 8.

## IV.

To take advantage of the proposal contained in this Act, the applicant must select the land he wishes to receive in lieu, and file a sufficient relinquishment of land within a forest reserve. **Manifestly there must be an acceptance of the relinquishment by some one authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu.**

Roughton vs. Knight, 219 U. S. 544; 55 Law ed. 326, 327.

## V.

Before one can acquire an equitable title to lands selected by him in lieu of lands relinquished in a forest reservation under Act of June 4, 1897, his relinquishment and lieu selection must be approved by some officer authorized to make such approval.

530 332

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301; 47 Law ed. 1064, 1072.

## VI.

A lieu selector under the Act of June 4, 1897, must accompany his application by a non-mineral and non-occupancy affidavit.

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XXX L. D. 570, 580.

520 60



## ARGUMENT.

We understand that there are sixteen of these cases now pending in this court on appeal, instituted by A. D. Daniels against different defendants, all involving the same essential facts, and principles of law, and all heard and decided in the lower court at the same time. In one of these cases, Daniels vs. Wagner, 194 Fed. 973, Judge Bean in the lower court rendered a written opinion which states the essential facts of the case together with the controlling principles of law in such a concise and forceful manner that we here quote the opinion in full:

“This is a suit for a decree declaring the defendant to hold the legal title to certain real property in section 2, township 37 S., range 10 E., in trust for the plaintiff. The facts as they appear from the bill, in brief, are that on June 4, 1897, Congress passed an act providing, among other things:

“That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent.’ Act

June 4, 1897, c. 2, 30 Stat. 36 (U. S. Comp. St. 1901, p. 1541).

“By virtue of the provisions of this law there was filed on February 8, 1904, in the local land office, for and on behalf of the plaintiff, deeds by the owners of certain lands in the San Francisco Mountain forest reserve, accompanied by the requisite abstract of title, conveying such lands to the United States, and at the same time applications were made to select in lieu thereof the land in controversy; the same being at the time vacant, unappropriated lands of the United States, and open to settlement. Before the applications for exchange had been accepted or acted upon by the local land office, or by it forwarded to or considered by the Commissioner of the General Land Office, the defendant applied to enter the lands so selected under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]). Subsequently such proceedings were had in the Land Department that the applications were rejected, the entry of the defendant approved, and patent issued to him.

“The plaintiff now claims that by filing the relinquishments in the local land office, and designating the tracts desired to be selected in lieu of that relinquished, he acquired a vested right or interest in the land so selected, which could not be

impaired by subsequent applications to purchase the same under the Timber and Stone Act, and he seeks to invoke the rule applicable to homestead and pre-emption entries. I do not think the cases are at all analogous. The homestead and pre-emption laws were intended for the benefit of actual settlers, and so tender have the courts been of the rights of such settlers that, applying the doctrine that equity will consider that as done which ought to have been done, they have held that when a qualified entryman enters upon public lands open to settlement under the homestead or pre-emption laws, with the intent of acquiring title thereto, he has a vested right therein, of which he can only be deprived by his failure to comply with the conditions of the law, and that one to whom the Land Department may subsequently convey the title will be decreed to hold it in trust for the entryman. *Lytle et al. v. Arkansas*, 9 How. 314, 13 L. Ed. 153; *Nelson v. N. P.*, 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406.

“The act of 1897, under which plaintiff claims, however, merely signifies the willingness of the government to exchange vacant land open to settlement for an equal area of land within the limits of a forest reservation covered by a bona fide claim or patent, and no rights are acquired by the selector until his application for the exchange is approved. No method of procedure for effecting

the exchange is provided by law. The general administration of the forestry reservation acts, however, and the adjudication of the various questions arising therein, are vested in the Land Department. It has power and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation and the selection of other lands in lieu thereof, of which the courts will take judicial knowledge. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064. By the rules and regulations so formulated, one desiring to relinquish lands and select other lands in lieu thereof, where final certificate or patent has issued, is required to make a quitclaim deed to the United States for the land offered in exchange, have it recorded in the proper county, and file the same (accompanied by an abstract of title duly authenticated, showing a chain of title from the government back to the United States, to the property offered) in the local land office, and at the same time designate the particular tract which he desires in lieu of that relinquished.

“‘All applications for change of entry or settlement under this law must be forwarded by the local land officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the land applied for.’ William S. Tevis, 29 Land Dec. Dep. Int. 575.



“There is some language of Judge Ross in *Olive L. & D. Co. v. Olmstead* (C. C.) 103 Fed. 568, which is susceptible of the construction that the selector of lands under the act of 1897 becomes the equitable owner thereof upon the filing of his deed of relinquishment and notice of selection in the local land office and the acceptance thereof by such office; but in the subsequent case of the *Cosmos Ex. Co. v. Gray Eagle Oil Co.* (C. C.) 104 Fed. 20, the learned judge explains that the *Olive Case* was decided without reference to the rules of the Land Department regulating the procedure of applicants for exchange of lands under the act of 1897, and in the latter case he holds that under the rules so promulgated the local land office has no authority to approve a selection, but is required to refer the question to the General Land Office for its consideration, and that the selector has no vested interest in the land selected by him until the application is approved by the Land Department.

“This ruling was affirmed by the Court of Appeals (*Cosmos v. Gray Eagle*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230), and by the Supreme Court (*Cosmos v. Gray Eagle*, 190 U. S. 303, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064). In the latter case the court said that the complete equitable title of the selector is not ‘made out and cannot exist until a favorable decision by that depart-



ment (General Land Office) has been made regarding the sufficiency' of the proof and his right to the selected land, and that 'there must be a decision made somewhere regarding the rights asserted by the selector of the land under the act before complete equitable title to the land can exist; the mere filing of papers cannot create such a title; the applicant must comply with and conform to the statute, and the selector cannot decide the question for himself'; and that authority to determine whether the selector has complied with the provisions of the act and the regulations of the department is not vested in the local land officers, but in the Commissioner of the General Land Office, and, until he has approved the application, the selector is not vested with the equitable title to the land he assumes to select.

"Under this rule, it seems to me that the plaintiff acquires no title or right to the land selected by him by the mere filing of his application, and that it was within the power and jurisdiction of the Land Department to reject the same and award the land to a subsequent entryman under the Timber and Stone Act, and as a consequence that the plaintiff is not entitled to the relief prayed for in his bill.

"The demurrer will be sustained."

Anything which we may add will be only sup-

plemental to what Judge Bean has stated in the foregoing opinion.

**First.** We question the sufficiency of the allegations of the amended bill of complaint in the attempt to comply with the said Act of June 4, 1897, in that there is nothing to show that the selector at the time of filing his selection of the land in controversy, accompanied his said selection with a **non-mineral** and a **non-occupancy** affidavit. The allegation of the amended complaint is (Paragraph VII, Transcript, page 5) "and on the 8th day of February, 1904, filed with the Register and Receiver of the United States Land Office at Lakeview, Oregon, the said deed so recorded, together with a full, true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed it to be the owner in fee simple of said lands, free and clear of any lien or incumbrance, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished the E $\frac{1}{2}$  of NE $\frac{1}{4}$  of Sec. 24, Tp. 37, S. R. 10 E. W. M.," etc.

The Commissioner of the General Land Office would not have been justified in approving this lieu selection (which he did not do) without a showing that the land selected was non-mineral in

character and not actually occupied by some other claimant.

In *Gray Oil Co. vs. Clark*, XXX L. D. 570, 580, it was argued by the selector that no non-mineral or non-occupancy affidavit was required by the rules or regulations of the Land Department in force at the time the selection was made. In answer to this argument, Secretary Hitchcock says: "This contention cannot be sustained. The form of application prepared by your office for selections of land in lieu of tracts covered by patent in a forest reserve and specifically adopted as form 4-643 in the regulations of May 9, 1899 (28 L. D. 521, 524) and December 18, 1899 (29 L. D. 391, 394) requires the selector to accompany his application with 'an affidavit showing the land selected to be non-mineral in character and un-occupied.' It is thus clearly made incumbent upon one seeking to take advantage of the offer made by this law to establish the fact that the land he selects is of the character contemplated by the law. Until this fact is established his proffer of exchange is not complete." It appearing to Secretary Hitchcock in said case that subsequent to the time of filing the lieu selection, other claimants rights had intervened, he rejected the lieu selection.

**Second.** The allegations of the amended bill of complaint show that when said selector filed

his deed of relinquishment and abstract and selection of the land in controversy in the local land office, the Register and Receiver thereof did not forward the same to the Commissioner of the General Land Office for his consideration together with their report upon the land selected as they should have done under rule No. 18 (XXX L. D. 589, 592), but assumed jurisdiction within themselves and proceeded to reject said lieu selection; that said selector appealed from said decision of said Register and Receiver and this was followed by successive appeals and hearings in the Land Department, covering a period of about six years and culminating finally in the decision of the Hon. Frank Pierce, First Assistant Secretary of the Interior, adverse to appellant, set out as "Ex. A" to the amended bill of complaint herein.

Was said rule No. 18 ever complied with? We think not. On page 31 of the transcript of the record in this case we find the following as a part of the said decision of the said First Assistant Secretary of the Interior, to-wit:

"Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This, however, it has been seen, was not done."

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This finding of fact was made at the end of six years' litigation before the Land Department and may have been the controlling fact in inducing the said First Assistant Secretary to reject said lieu selection in his said opinion although he says further on that: "It is believed that these applications might have been allowed, **not as a matter of right**, but in the discretion of the Secretary of the Interior;" etc.

It is true that said amended bill of complaint shows that said lieu selection was before the Hon. Commissioner of the General Land Office at least three times on appeal during said six years of litigation, **but in each of said cases the General Land Office was acting as an appellate tribunal under the appellate land office practice and not as a tribunal of original jurisdiction under said rule No. 18 aforesaid.**

Hence said Rule No. 18 has never been complied with, which is a conclusion in conformity with the finding aforesaid of the Honorable the First Assistant Secretary.

Since the Hon. Commissioner of the General Land Office has original jurisdiction in the first instance to pass upon a lieu land selection, and since this has not at any time been done in reference to the lieu selection involved in this case, it follows that no equitable title to the land in



controversy has been acquired by appellant, following Mr. Justice Peckham's opinion in *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 47 Law ed. 1064, 1072, in which he says:

“Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited, that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.”

Further on in the same opinion Mr. Justice Peckham says: “What may be the decision of the Land Department upon these questions in this

case cannot be known, but, until the various questions of law and fact have been determined by that department in favor of the complainant, it cannot be said that it has a complete equitable title to the land selected."

**Third.** The gist of the claim of counsel for appellant is that their client has complied with the requirements of the Act of June 4, 1897, and the regulations promulgated by the Land Department thereunder (which we do not concede) and that his lieu land selection has been approved by the Land Department as to the sufficiency and regularity of this application, although rejected through an erroneous application of law (all of which we have hereinbefore shown to the contrary) and that by an application of the "doctrine of relation" appellant has a vested right in the land in controversy as of the date of the attempted lieu selection thereof, to-wit: Feb. 8, 1904.

If we should concede counsel's assumption of facts, we do not think that their conclusions would follow. Their argument is based largely upon *Weyerhauser v. Hoyt*, 219 U. S. 380, which it should be observed, deals with an indemnity selection under the Northern Pacific Railway grant. This grant was a grant **in presenti** in the nature of a float, which became fixed and title passed when selection was made and such selection approved by the Secretary of the Interior. By such a grant

the government recognized a debt or obligation due to the railroad company and proceeded to satisfy the same by a present grant of lands which needed only to be identified for the title to pass and the transaction to be closed. Recognizing this obligation on the part of the government and the narrow limits within which the selection must be made, it is not unreasonable or unequitable that our courts should hold in such a case that the doctrine of **relation** applies but even in such a case the dissenting opinion of Justices Harlan and Day in *Weyerhauser v. Hoyt*, *supra*, shows that the opposite view is without neither reason nor precedent. While the doctrine of relation is a legal fiction, it is of equitable origin and is invoked by the courts solely for the purposes of justice and in aid of some equity. This doctrine does not create the equity but aids a pre-existing equity. Hence the universal application of this doctrine to actual settlers upon the public domain under the homestead and pre-emption laws. 53 Or

However the status of the selector with the government under the Act of June 4, 1897, presents a different aspect. The government owes him nothing; grants him nothing; undertakes to give him nothing, except an option to exchange lands, under certain conditions, which he may exercise or not at his pleasure or profit. The advantages are all with the selector. He has the

whole public domain from which to choose. He may withdraw his proposal to exchange at any time before acceptance. If his first selection is invalid for any reason not his own fault, he may make another and so on. Now, why should the doctrine of relation apply to a lieu selection made under such circumstances? Why, indeed, when, if one selection is rejected he can make another without losing any rights? According to the statement of counsel for appellant between the filing of the lieu selection in this case and the action of the Land Department thereon, numerous homestead and timber and stone claimants filed on the land selected. The Land Department thought that said homesteaders and timber and stone claimants were more entitled to equitable consideration than the selector, appellant. What reason is there for a contrary opinion?

For the foregoing reasons we submit that the decree of the lower court should be affirmed.

Respectfully submitted,

L. F. CONN, and  
KING & SAXTON,  
Solicitors for Appellees.

IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

---

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Plaintiff in Error,

VS.

IDA M. MOATS, guardian of the person and estate of  
GEORGE A. MOATS, a minor,  
Defendant in Error.

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On Writ of Error to the United States District  
Court for the District of Oregon

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TRANSCRIPT OF RECORD.

**ECEIVED**

DEC 27 1912

F. D. MONCKTON,  
CLERK.

**FILED**

JAN. - 2 1913

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No.

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**United States Circuit Court of Appeals**  
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Plaintiff in Error,

vs.

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GEORGE A. MOATS, a minor,

Defendant in Error.

---

**Names and Addresses of Attorneys  
Upon This Writ:**

---

**For the Plaintiff in Error:**

PLATT & PLATT and HUGH MONTGOMERY,  
Board of Trade Bldg., Portland, Oregon

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**For the Defendant in Error:**

C. E. COCHRAN,  
Wells Fargo Bldg., Portland, Oregon.

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*In the District Court of the United States for the  
District of Oregon.*

Be it Remembered, That on the 27 day of December, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Transcript of Record on Removal, in words and figures as follows, to wit:

**[Complaint.]**

*In the Circuit Court of the United States for  
Union. County*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

The plaintiff, for her cause of action against the defendant, alleges:

I.

The plaintiff, Ida M. Moats, is the duly appointed, qualified and acting guardian of George A. Moats, who is a minor, and was appointed such guardian on the 20th day of June, 1911, and ever since said time and is now acting as such, and brings this action for and on behalf of said minor.

II.

The defendant is a corporation, organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of

business in the City of New York in said State, and that at all the times and dates hereinafter mentioned, said New York Life Insurance Company had complied with all the laws of the State of Oregon relative to the transaction of a general life insurance business in said State, and was duly authorized and licensed to transact a life insurance business in the State of Oregon, and for that purpose maintained an agency and branch office in Union County, State of Oregon, at which place a general life insurance business, during all the times and dates in this complaint mentioned, was being carried on and transacted.

### III.

On or about the 16th day of March, 1911, the defendant, New York Life Insurance Company in Union County, Oregon, made and entered into a contract with one, George S. Moats, late husband of the plaintiff, for the use and benefit of the plaintiff's ward, George A. Moats, which said contract is in words and figures as follows:

#### NEW YORK LIFE INSURANCE COMPANY.

BY THIS POLICY OF INSURANCE AGREES  
TO PAY .....  
..... FIVE THOUSAND .....Dollars  
at the Home Office of the Company in the City and  
State of New York to George A. Moats, son of the  
insured..... beneficiary, with right of revocation,  
upon receipt at said Home Office of due proof of  
the death, during the continuance of this contract,

of GEORGE S. MOATS, the Insured.

This contract is made in consideration of the first premium of One hundred thirty-four 15|100 Dollars, the receipt of which is hereby acknowledged, constituting payment for the period terminating on the Sixteenth day of March in the year Nineteen Hundred and Twelve and the payment of a like sum on said date and on the Sixteenth day of March in every year thereafter during the continuance of this Policy, until the death of the Insured; but after one full annual premium has been paid, the Company, by endorsement on this Policy, will waive payment of premiums under the conditions stated in Section 7 on the next page, entitled "Waiver of Premiums."

THIS POLICY SHALL PARTICIPATE IN THE  
SURPLUS OF THE COMPANY.

The proportion of divisible surplus accruing on this Policy shall be ascertained and distributed annually and not otherwise, and at the option of the Insured shall each year, on the anniversary of the Policy, be either

- (1) Paid in Cash; or,
- (2) Applied toward the payment of any premium or premiums; or,
- (3) Applied to the purchase of participating Paid-up Additions to the Policy; or,
- (4) Left to accumulate to the credit of the Policy, with compound interest at the rate of three per centum per annum, and payable at the maturity of the Policy, but withdrawable on any annivers-



ary of the Policy.

Unless the Insured shall elect otherwise within three months after the mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of participating Paid-up Addition (Option No. 3) which may be surrendered for cash at any time, and the Cash Value thereof shall not be less than the original cash dividend.

The benefits and provisions printed or written by the Company on the following pages, are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

After delivery of this Policy to the Insured, it takes effect as of the Sixteenth day of March, Nineteen Hundred and Eleven.

In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Twenty-fifth day of March, Nineteen Hundred and Eleven.

(Sgd.) DARWIN P. KINGSLEY,  
President.

(Sgd.) SEYMOUR M. BALLARD,  
Secretary,

(Sgd.) WM. W. OERREN,  
Registrar.

Examined,  
EK

Age 33: Insurance Payable at Death: Premiums Payable During Life: Annual Dividend. 910-404.

## BENEFITS AND PROVISIONS.

1. THE CONTRACT—This Policy is free of conditions as to residence, travel or occupation. The Policy constitutes the entire contract between the parties, and no agent is authorized to waive forfeitures or to make, modify or discharge contracts, or to extend the time for paying a premium.

2. INCONTESTABILITY.—This Policy shall be incontestable after one year from its date of issue except for non-payment of premium.

3. SELF-DESTRUCTION. — Self-destruction during the first policy year, whether the insured be sane or insane, is a risk not assumed by the Company; but in such case the Company will return the premiums actually received.

4. AGE.—If the age of the Insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

5. PAYMENT OF PREMIUMS.—All premiums are payable at the Home Office of the Company or to an agent of the Company upon delivery of a receipt, on or before the date due, signed by an Executive Officer of the Company, namely the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer, and countersigned by said agent. The premium is always considered as payable annually, in advance, but by agreement in writing and not otherwise may be made payable in semi-annual or quarterly payments. Any unpaid premiums required to complete the payments for the current policy year in

which death occurs shall be deducted from the amount payable hereunder. The payment of a premium shall not maintain the policy in force beyond the date when the next payment is due, except as hereinafter provided.

6. GRACE.—A grace of one month (not less than thirty days) subject to an interest charge of five per centum per annum will be allowed for the payment of every premium after the first, during which time the insurance shall continue in force. If death occurs within the period of grace the unpaid premium for the then current Policy year shall be deducted from the amount payable hereunder.

7. WAIVER OF PREMIUMS.—The Company, by endorsement hereon, will waive payment of the premiums thereafter becoming due, if the insured, before attaining the age of sixty years and after paying at least one full annual premium and before default in the payment of any subsequent premium, shall furnish proof satisfactory to the Company that he has become wholly and permanently disabled by bodily injury or by disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit, or from following any gainful occupation. Any premiums so waived shall not be deducted from the sum payable under the Policy, and the values provided for in Section "12. Cash Loans", and Section "15. Benefits on Surrender or Lapse", shall be the same as if such premiums had been paid in cash. Provided that, notwithstanding proof of disability

may have been accepted by the Company as satisfactory, the Insured shall at any time, on demand, furnish the Company satisfactory proof of the continuance of such disability; and if the Insured shall fail to furnish such proof, or if it shall appear to the Company that the Insured is able to perform any work or to follow any occupation whatsoever for compensation, gain or profit, all premiums thereafter falling due must be paid in conformity with this contract.

Without prejudice to any other cause of disability, the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands above the wrists, or of both feet above the ankles, or of one entire hand and one entire foot will be considered as total and permanent disability within the meaning of this provision.

8. CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the Insured, if there be no existing assignment of the Policy made as herein provided, may, while the Policy is in force, designate a new beneficiary, with or without reserving right of revocation, by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable endorsement thereon. Such change shall take effect when endorsed on the Policy by the Company and not before. If any beneficiary shall die before the Insured, the interest of such beneficiary shall vest in the Insured.

9. PRIVILEGE OF CHANGE TO OTHER



FORMS OF POLICIES.—At any time, and while in full force, and provided the Insured is then less than 60 years of age, this Policy may be changed without medical re-examination for a Policy of the same amount, upon any plan issued by the Company at the time this Policy takes effect and having a higher rate of premium. Such change shall be effective upon payment of a sum equal to the difference between the premiums on the new Policy and the premiums paid on this Policy, with compound interest at the rate of five per centum per annum from the due date of each payment to the date when the change is made, and upon the surrender of this Policy. The New Policy will take effect as of the date of this Policy, and the premiums will be based upon the same age as this Policy. The cash value of any dividends standing to the credit of this Policy, as well as any additional cash value of such dividends that would have been credited under the new Policy may be used in the settlement of the difference of premiums.

10. REINSTATEMENT.—At any time after any default, upon written application by the Insured and upon presentation at the Home Office of evidence of insurability satisfactory to the Company, this Policy may be reinstated, together with any indebtedness in accordance with the loan provisions of the Policy, upon payment of arrears of premiums with interest thereon at the rate of five per centum per annum.

11. ASSIGNMENT.—Any assignment of this



Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility as to the validity of any assignment.

12. CASH LOANS.—At any time after two full years' premiums have been paid and while this Policy is in full force, the Company will advance, on the pledge of the Policy and on the sole security thereof, an amount which, with interest thereon to the end of the current policy year and with any unpaid portion of said year's premium, shall, at the option of the owner, be equal to or less than the Cash Surrender Value at the end of such policy year, including the Cash Surrender Value of any dividend additions. Interest on the loan will be at the rate of five per centum payable annually; if interest is not paid when due, it shall be added to the principal and bear interest at the same rate. Failure to repay any such advance or to pay interest shall not avoid this Policy unless the total indebtedness hereon to the Company shall equal its Cash Surrender Value, nor until one month after notice of such fact shall have been mailed by the Company to the last known address of the Insured and of the Assignee of record at the Home Office of the Company, if any, in which event the Policy shall become void.

13. PREMIUM LOANS.—Whenever the net loan value of this Policy shall be sufficient to pay one full annual premium with five per centum interest thereon for one year, the Company will, before the expiration of the days of grace, accept a premium

lien note of the owners of the Policy in lieu of cash for premium, said note to be a lien against the Policy and subject to the same terms and conditions as cash loans except that the Policy need not be deposited with the Company as a pledge. The total indebtedness on this Policy, however incurred, shall never exceed its Cash Surrender Value.

#### 14. PAID-UP AND ENDOWMENT OPTIONS

—Whenever the reserve on this Policy together with the reserve on existing dividend additions, if any, at the end of any policy year shall equal or exceed the net single premium for the attained age of the Insured by the American Experience Table of Mortality and Interest at three per centum, for an amount of insurance equal to the face amount of this Policy, payable at the same time and under the same conditions as this Policy, the Company, at the written request of the Insured, will endorse the Policy as participating paid-up insurance for such amount as the said reserve will purchase when thus applied, any indebtedness to the Company to be a lien against said paid-up insurance upon the same terms and conditions as in Section 12 above; or, whenever said reserve at the end of any policy year shall equal or exceed the face amount of this Policy, the Company, upon surrender of the Policy and all claims thereunder, will pay in cash the face amount of the Policy and any excess of said reserve, less any indebtedness to the Company on account of this Policy.

#### 15. BENEFITS ON SURRENDER OR LAPSE.

—After two full annual premiums shall have been

paid, the owner may elect within three months after any default in payment of premium, but not later, either

(a) To accept the Cash Surrender Value; or,

(b) To have insurance for the face amount of this Policy plus any dividend additions and less any indebtedness to the Company hereon continue in force from the date of default for such term as the Cash Surrender Value will purchase as hereinafter provided, but without future participation and without the right to loans or Cash Surrender Value; or,

(c) To purchase non-participating Paid-up Insurance payable at the same time and on the same conditions as this Policy. The insured may at any time obtain a loan on such Paid-up Insurance in accordance with the provisions contained in Section "12. Cash Loans," or surrender the Policy for its Cash Surrender Value.

THE CASH SURRENDER VALUE, after premiums have been paid for two years or more, will be the reserve on this Policy, and the reserve on any dividend additions thereto, at the date of default, computed according to the American Table of Mortality and interest at the rate of three per centum per annum, less the amount of any indebtedness to the Company, and less a surrender charge which in no case shall be more than one and one-half per centum of the sum insured; after premiums have been paid for ten years or more there will be no surrender charge.

THE TERM FOR WHICH SAID INSURANCE

WILL BE CONTINUED, or the amount of PAID-UP INSURANCE will be such as said Cash Surrender Value will purchase as a net single premium at the age of the Insured at the date of default according to the American Table of Mortality and interest at the rate of three per centum per annum. If the Insured shall not, within three months after default, surrender this Policy to the Company at the Home Office for its Cash Surrender Value as provided in option (a) or for paid-up insurance as provided in option (c), the insurance will be continued as term insurance as provided in option (b).

The figures contained in the following "Table of Loan and Surrender Values" represent the actual amounts available after deduction of the surrender charge, if any, and are computed in accordance with the above provisions and upon the assumptions that premiums have been paid in full for the number of years stated in the table, and that there is no indebtedness on the Policy, and that there are no outstanding dividend additions.

#### TABLE OF LOAN AND SURRENDER VALUES.

The Cash Surrender, Loan and Paid-up Insurance values stated in the following table apply to a policy of \$1,000. As this Policy is for \$5,000, the Cash Surrender Value and Loan Value (Col. 1), and the Paid-up Insurance (Col. 2), will be five times the amounts stated in the table; the periods of Continued Insurance (Col. 3), must not be multiplied or increased.

After Policy Has Been in Force.	Column 1. CASH SUR- ENDER VALUE LOAN VALUE*	Column 2. PAID-UP LIFE IN- SURANCE.	Column 3. \$5000 INSUR- ANCE CONTINUED FOR.
			Yrs. Mos.
2	\$ 12	\$ 27	1 — 4
3	30	69	3 — 5
4	40	92	4 — 7
5	52	119	6 — 0
6	66	147	7 — 6
7	83	180	9 — 2
8	100	213	10 — 8
9	117	246	12 — 1
10	135	277	13 — 3
11	150	304	14 — 0
12	166	330	14 — 8
13	182	255	15 — 2
14	199	380	15 — 7
15	216	405	15 — 11
16	234	429	16 — 2
17	251	453	16 — 4
18	269	476	16 — 5
19	287	499	16 — 6
20	306	521	16 — 6
21	324	542	16 — 5
22	343	563	16 — 4
23	362	583	16 — 2
24	381	603	16 — 0
25	400	622	15 — 10
Years.			

Values for later years will be computed upon the above basis, and will be furnished on request.

\*The Loan Values in the above table are the maximum amounts available at the **end** of the policy year indicated. Loans may also be obtained **during** the policy year as set forth in Section 12 entitled "Cash Loans."



## 16. MODES OF SETTLEMENT UPON DEATH OF INSURED.

If there be no existing assignment of the Policy made as herein provided, the Insured or in case the Insured shall have made no election, the Beneficiary after the Insured's death, may be written notice to the Company at its Home Office, elect to have the net sum payable under this Policy upon the death of the Insured paid either in cash or as follows:

- (1) By the payment of interest at the rate of three per centum of such net sum, payable one year after receipt and approval of proofs of death, and at the end of each year thereafter during the lifetime of the beneficiary and, unless otherwise directed in said notice, by the payment upon the death of the beneficiary of the said net sum, together with any accrued interest for the year then current, to the beneficiary's legal representatives or assigns.
- (2) By the payment of equal annual installments for a specified number of years, the first installment being payable immediately, in accordance with the following Installment Table, either to the Beneficiary, or if there be more than one beneficiary, to the beneficiaries jointly and to the survivor.

- (3) By the payment of equal annual installments for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, the first installment being payable immediately, in accordance with the following Installment Table. If there be more than one beneficiary, the proceeds of this Policy, unless otherwise directed in said notice, shall be considered as divided into equal parts. The amount payable to each such beneficiary, shall be determined in accordance with the following Installment Table for the ages attained by said beneficiaries.

Any installments payable under (2) or (3) which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

INSTALLMENT TABLES.—Installment payments under any option may be made annually, semi-annually, quarterly or monthly; the minimum basis of such payments will be \$50, when paid annually, \$25 when paid semi-annually, \$15 when paid quarterly, or \$10 when paid monthly, and the total of the fractional payments each year shall equal the annual payment each year as shown in the following tables, which are based upon a Policy, the proceeds of which are \$1,000. The figures contained in the table will apply pro rata to this Policy.

OPTION (2).				OPTION (3).			
Num- ber of Annual install- ments	Amount of each annual instal- ment	Age of benefi- ciary at death of insured	Amount of each annual instal- ment.	Age of benefi- ciary at death of insured	Amount of each annual instal- ment.	Age of Benefi- ciary at death of insured.	Amount of each annual instal- ment.
2	\$507.39	0	\$42.48	25	\$43.15	50	\$56.60
3	343.23	1	40.17	26	43.49	51	57.29
4	261.19	2	39.38	27	43.84	52	57.98
5	211.99	3	39.06	28	44.20	53	58.66
6	179.22	4	38.93	29	44.58	54	59.32
7	155.83	5	38.91	30	44.98	55	59.96
8	138.30	6	38.96	31	45.39	56	60.68
9	124.69	7	39.05	32	45.82	57	61.16
10	113.81	8	39.19	33	46.27	58	61.72
11	104.92	9	39.35	34	46.73	59	62.23
12	97.53	10	39.52	35	47.22	60	62.71
13	91.29	11	39.70	36	47.73	61	63.15
14	85.94	12	39.88	37	48.25	62	63.54
15	81.32	13	40.08	38	48.79	63	63.89
16	77.29	14	40.28	39	49.36	64	64.20
17	73.74	15	40.49	40	49.94	65	64.45
18	70.59	16	40.71	41	50.54	66	64.67
19	67.78	17	40.94	42	51.17	67	64.88
20	65.25	18	41.18	43	51.80	68	64.98
21	62.98	19	41.42	44	52.45	69	65.09
22	60.91	20	41.68	45	53.12	70	65.16
23	59.04	21	41.95	46	53.80	71	65.21
24	57.32	22	42.24	47	54.49	72	65.23
25	55.75	23	42.53	48	55.19	73	65.25
		24	42.84	49	55.89	and over.	

Unless otherwise specified by the Insured or by the Beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of installments for the commuted value of the payments yet to be made, computed upon the same basis as Option (2) in the above table; provided that no such surrender will be made under (3) except after the death of the beneficiary occurring within the aforesaid twenty years.

The above Modes of Settlement are based upon an assumed interest earning of three per centum, but if in any year the Company shall declare for that year on funds held by it under such Modes of Settlement a greater interest rate than three per centum the sums payable under Options 1 and 2 and the installments for the fixed period of twenty years under Option 3, shall be increased accordingly.

The above Modes of Settlement are not applicable if the beneficiary be a firm or corporation, nor if the net sum payable under the Policy shall be less than \$1,000.

(Endorsements on back as follows:)

NEW YORK LIFE  
INSURANCE  
COMPANY  
GEORGE S. MOATS

No. 4 258 253.

Amount \$5,000.

Annual Premium \$134.15.

NOTICE: It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm or corporation, in collecting the Insurance under this Policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Home Office, 346 and 348 Broadway, New York City.

IV.

The said George S. Moats, on the 16th day of March, 1911, paid to the defendant the sum of \$134.15, being the first premium provided for in said contract,

and being the amount, the receipt of which is acknowledged by the terms of said contract, and which said amount constituted payment for the period terminating on the 16th day of March, in the year 1912, and said amount was the entire consideration for said contract, and no other contract or agreement was made with reference thereto.

#### V.

Thereafter, and during the continuance of said contract, and on the 14th day of June, 1911, the said George S. Moats died, and at the time of his death, was a resident of Union County, State of Oregon, and according to the terms of said contract, the said sum of \$5,000 insured to the benefit of the said George A. Moats, the ward of this plaintiff, and the said defendant became and was obligated to pay to the plaintiff as the guardian of the said George A. Moats, upon receipt of due proof of the death, during the continuance of said contract of the said George S. Moats, the insured, the sum of \$5,000.

#### VI.

After the death of the said George S. Moats, and prior to the commencement of this action, to-wit: on or about the 15th day of July, 1911, the said defendant Company received at its Home Office in the City and State of New York, due proof of the death of the said George S. Moats, during the continuance of the said contract of insurance.

#### VII.

That the said contract of insurance was made in Union County, State of Oregon.



VIII.

That the Defendant Company is not a resident of the State of Oregon, and the plaintiff hereby designates the County of Union and State of Oregon, as the place of trial of this action.

IX.

By reason of the premises, there is due and owing to the plaintiff, as guardian of the person and estate of George A. Moats, a minor, the beneficiary, from the defendant the sum of \$5,000 with interest at the rate of six per cent per annum from the 15th day of July, 1911, and the defendant at the time said proof of death was received by it, and ever since, has and does now refuse to pay the said sum of \$5,000, being the amount named in said contract of insurance, or any part thereof.

WHEREOF, plaintiff demands judgment against the defendant for the sum of Five Thousand (\$5,000.) Dollars, with interest at the rate of six per cent per annum, from the 15th day of July, 1911, until paid, and for her costs and disbursements of this action.

COCHRAN & COCHRAN,

Attorneys for Plaintiff.

STATE OF OREGON,

County of Union—ss.

I, IDA M. MOATS, being first duly sworn, depose and say: that I am the plaintiff above named; that I have read the foregoing Complaint, and that the same is true as I verily believe.

IDA M. MOATS.

Subscribed and sworn to before me this the 18 day  
of September, A. D., 1911.

[Seal.]

C. E. COCHRAN,  
Notary Public for Oregon.

[Endorsed]:

*In the Circuit Court of the State of Oregon for the  
County of Union.*

IDA M. MOATS, Guardian of the person and estate  
of GEO. A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

Complaint. Filed Sept. 18, 1911.

ED WRIGHT,  
Clerk.

By Anna Alexander, Deputy.

[Summons.]

*In the Circuit Court of the State of Oregon for the  
County of Union.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

TO NEW YORK LIFE INSURANCE COMPANY  
the above-named defendant ,

IN THE NAME OF THE STATE OF OREGON,  
You are hereby required to appear and answer the complaint filed against you in the above entitled action within ten days from the date of the service of this summons upon you, if served within this county; or, if served within any other county of this state, then within twenty days from the date of the service of this summons upon you; and if you fail so to answer, for want thereof, the plaintiff will take judgment against you for the sum of five thousand dollars with interest at the rate of six per cent per annum from the 15th day of July, 1911, and for plaintiff's costs and disbursements.

COCHRAN & COCHRAN,

Attorney for Plaintiff.

STATE OF OREGON,

County of Multnomah—ss.

I hereby certify that I have served the within summons within said county, this 30th day of September 1911, on the within named defendant, New York Life Insurance Company, a corporation, by delivering a true copy thereof, prepared and certified to by me as sheriff, together with a copy of the complaint, prepared and certified to by C. E. Cochran, one of the Attorneys for the Plaintiff herein, County Clerk of said county, to Milton Maxon, attorney in fact for said defendant corporation, personally and in person.

Signed R. L. STEVENS,

Sheriff of Multnomah County, Oregon,

By Jacob Proebstel, Deputy.

Filed Oct. 11, 1911.

ED. WRIGHT,  
County Clerk.

**[Petition for Removal.]**

*In the Circuit Court of the State of Oregon for the  
County of Union.*

IDA M. MOATS, Guardian of the person and estate  
of George A. Moats, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,  
Defendant.

PETITION FOR REMOVAL TO THE CIRCUIT  
COURT OF THE UNITED STATES FOR  
THE DISTRICT OF OREGON.

Comes now the defendant above named, and petitions this honorable Court for a removal of the above entitled cause from the Circuit Court of the State of Oregon for the County of Union to the Circuit Court of the United States for the District of Oregon, and for grounds of such petition shows and alleges:

I.

That heretofore, and on or about the 18th day of September, 1911, the plaintiff above named instituted an action in the Circuit Court of the State of Oregon for the County of Union against the defendant above named, for the recovery of the sum of five thousand dollars, exclusive of interest and costs, alleged to be due and owing from the above named defendant to the above named plaintiff.

## II.

That the defendant above named is a corporation incorporated, organized, and existing under and by virtue of the laws of the State of New York, with its principal office and place of business in the City of New York in said state, and that at the time of the commencement of the above entitled action in the Circuit Court of the State of Oregon for the County of Union the said defendant was and still is, a citizen and inhabitant of the State of New York, and was not, at the time of the commencement of the above entitled action, and is not now, a citizen and inhabitant of the State of Oregon.

## III.

That the plaintiff above named was, at the time of the commencement of the above entitled action, and still is, a citizen and inhabitant of the State of Oregon, residing in the County of Union, said state.

## IV.

That the time within which the defendant above named must answer or plead in the above entitled cause in the Circuit Court of the State of Oregon for the County of Union, as provided by the laws for the State of Oregon, has not yet expired.

## V.

That this is a controversy between citizens of different states, and is a cause which comes within the provisions of the Act of Congress of March 3, 1875, Chap. 137, Secs. 1 and 2, as amended by the Acts of Congress of March 3, 1887, Chap. 373, Secs. 1 and 2, and August 13, 1888, Chap. 866, Secs. 1 and 2, and



your petitioner desires, in accordance with the provisions of said Act of Congress of March 3, 1875, as amended, to remove this cause, before the trial thereof, and before any appearance has been made therein upon the part of the defendant above named, to the Circuit Court of the United States for the District of Oregon.

## VI.

That the matter in dispute in the above entitled action exceeds, exclusive of interest and costs, the sum and value of two thousand dollars, and exceeded the sum of two thousand dollars, exclusive of interest and costs, at the time of the commencement of the above entitled action in the Circuit Court of the State of Oregon for the County of Union.

## VII.

That your petitioner offers herewith a good and sufficient bond conditioned upon his entering in the Circuit Court of the United States for the District of Oregon on the 1st day of its next session a copy of the record of the above entitled action, and for paying all costs that may be awarded by the said Circuit Court of the United States for the District of Oregon, if said court shall hold that such action was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that the said bond may be accepted, and that the above entitled action may be removed into the Circuit Court of the United States for the District of Oregon, pursuant to the provisions of the statutes of the United States, and

for an order of this court directing such removal, and that no further proceedings be had herein in the Circuit Court of the State of Oregon for the County of Union.

(Sd.) PLATT & PLATT, HUGH MONTGOM-  
ERY,

Attorneys for Defendant.

STATE OF OREGON,

County of Multnomah—ss.

I, Hugh Montgomery, being first duly sworn, depose and say that I am one of the attorneys for the defendant in the above entitled cause; and that the foregoing petition for removal to the Circuit Court of the United States for the District of Oregon is true as I verily believe.

(Sd.) HUGH MONTGOMERY,

Subscribed and sworn to before me this 10 day of October, 1911.

[Notarial Seal.] (Sd.) C. G. BUCKINGHAM,

Notary Public for the State of Oregon.

Endorsed:

*In the Circuit Court of the State of Oregon for the  
County of Union.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

Petition for removal to the Circuit Court of the United States for the District of Oregon.

Filed Oct. 11, 1911.

(Sd.) ED. WRIGHT,  
Clerk.

By Anna Alexander, Deputy.

**[Bond on Removal.]**

*In the Circuit Court of the State of Oregon for the  
County of Union.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,  
Defendant.

KNOW ALL MEN BY THESE PRESENTS, that we, the New York Life Insurance Company, a corporation, of the City of New York and State of New York, as principal, and Fidelity and Deposit Company of Maryland, of the City of Baltimore and State of Maryland, as surety, are held and firmly bound unto Ida M. Moats, Guardian of the person and estate of George A. Moats, a minor, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made unto the said Ida M. Moats, Guardian of the person and estate of Geo. A. Moats, a minor, her heirs, representatives, and assigns, we bind ourselves, our successors, representatives, and assigns jointly and severally, firmly by these presents.

UPON CONDITION nevertheless, that, WHEREAS, the said New York Life Insurance Company has filed its petition in the Circuit Court of the State of Oregon for the County of Union for the removal of that certain cause therein pending, wherein the said Ida M. Moats, Guardian of the person and estate of George A. Moats, a minor, is plaintiff, and the said New York Life Insurance Company is defendant, to the Circuit Court of the United States in and for the District of Oregon.

NOW, THEREFORE, if the said New York Life Insurance Company shall enter in the said Circuit Court of the United States for the District of Oregon on the first day of its next session a copy of the record in the said cause of Ida M. Moats, Guardian, of the person and estate of George A. Moats, a minor, vs. the New York Life Insurance Company, and shall take the necessary steps to effect and accomplish such removal from the Circuit Court of the State of Oregon for the County of Union to the Circuit Court of the United States for the District of Oregon, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States for the District of Oregon, if said court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, the New York Life Insurance Company, as principal, by Robert Treat Platt, its attorney of record thereunto duly authorized, and the Fidelity and Deposit Company of Mary-

land, as surety, by Robert Treat Platt, its attorney in fact, and W. J. Clemens, its agent, have hereunto set their hands and seals this 10th day of October, 1911.

NEW YORK LIFE INSURANCE COMPANY,

By Robert Treat Platt, [Seal.]

of Its Attorneys of Record.

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND,

By Robert Treat Platt, [Seal.]

[Corporate Seal.]

Its Attorney in Fact.

By W. J. Clemens, [Seal.]

Its Agent.

Approved by J. W. Knowles,

Judge of the Circuit Court of the

State of Oregon for the County of Union.

Endorsed:

*In the Circuit Court of the State of Oregon for the  
County of Union.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

BOND.

Filed Oct. 11, 1911.

(Sd.) ED. WRIGHT,

Clerk.

By Anna Alexander, Deputy.



**[Order of Removal.]**

*In the Circuit Court of the State of Oregon for the  
County of Union.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

Now at this time, this cause coming on to be heard, upon petition of the defendant for a removal of said cause from the Circuit Court of the State of Oregon for the County of Union to the Circuit Court of the United States for the District of Oregon; and,

IT APPEARING TO THE COURT that the defendant above named was, at the time of the commencement of the above entitled action, and still is, a citizen and inhabitant of the State of New York, and that the plaintiff above named was, at the time of the commencement of the above entitled action, and still is, a citizen and inhabitant of the State of Oregon; and,

IT FURTHER APPEARING TO THE COURT that this is an action to recover the sum of five thousand dollars, exclusive of interest and costs, and that the amount in controversy exceeds the sum of two thousand dollars, exclusive of interest and costs, and that this is an action between citizens of different states and comes within the provisions of the Act of

Congress of March 3, 1875, Chap. 137, Secs. 1 and 2, as amended, and that the said defendant has filed herein its bond in the penal sum of five hundred dollars, conditioned upon the payment of all costs that may be awarded to the plaintiff, if the Circuit Court of the United States for the District of Oregon shall hold that said suit was wrongfully or improperly removed thereto, and upon the further condition that the said defendant, on the first day of the next session of the Circuit Court of the United States for the District of Oregon, enter a copy of the record of the above entitled action in said court, and take all steps necessary to perfect such removal; and,

IT FURTHER APPEARING TO THE COURT that this is a proper cause in which to order a removal of said action from the Circuit Court of the State of Oregon for the County of Union to the Circuit Court of the United States for the District of Oregon;

NOW, THEREFORE, IT IS CONSIDERED AND ORDERED that the bond of the defendant be, and the same is, hereby approved, and that this cause be, and the same is, hereby removed for trial to the Circuit Court of the United States for the District of Oregon, pursuant to the provisions of the statutes of the United States, and that all other or further proceedings in the above entitled action in this court be stayed.

(Sd.) J. W. KNOWLES,

Judge.

Dated this 11th day of October, 1911.

[Certificate of Clerk of State Court.]

STATE OF OREGON,

County of Union—ss.

I, Ed Wright, County Clerk of Union County, Oregon, and ex-officio Clerk of the Circuit Court for said County and State, do hereby certify that the foregoing copy of Complaint, Summons, Petition for Removal, Bond and Order in the case of Ida M. Moats, Guardian of the person and estate of George A. Moats, a minor, Plaintiff, vs. New York Life Insurance Company, a corporation, Defendant, is a true and correct transcript therefrom and the whole thereof, as the same appears on file and of record in my office and in my official custody; and that each of said copies of said record have been by me compared with the original and is a true and correct copy of the same and of the whole thereof, and that said Complaint, Summons, Petition for Removal, Bond and Order constitute all the papers now on file in said cause in my office and in my official custody.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said Circuit Court, this the 11th day of October, A. D., 1911.

[Seal.]

(Sd.) ED WRIGHT,

County Clerk.

[Endorsed]: United States Circuit Court, District of Oregon. Transcript of Record from Union County.

Filed Dec. 27, 1911.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 30 day of December, 1911, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

[Answer.]

*In the Circuit Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

Comes now the defendant in the above entitled cause, and for its answer to plaintiff's complaint herein filed denies, admits, and alleges as follows:

I.

Defendant admits paragraph I of plaintiff's complaint herein filed in the above entitled cause.

II.

Defendant denies paragraph II of plaintiff's complaint herein filed in the above entitled cause and each and every allegation thereof, except as hereinafter affirmatively admitted to be true.

III.

Defendant denies paragraph III of plaintiff's complaint herein filed in the above entitled cause and each and every allegation thereof, except as hereinafter affirmatively admitted to be true.

IV.

Defendant denies paragraph IV of plaintiff's complaint herein filed in the above entitled cause, and each and every allegation thereof, except as hereinafter affirmatively admitted to be true.

V.

Defendant denies paragraph V of plaintiff's complaint herein filed in the above entitled cause and each and every allegation thereof, except as hereinafter affirmatively admitted to be true.

VI.

Defendant denies paragraph VI of plaintiff's complaint herein filed in the above entitled cause and each and every allegation thereof, except as hereinafter affirmatively admitted to be true.

VII.

Defendant denies paragraph VII of plaintiff's complaint herein filed in the above entitled cause and each and every allegation thereof, except as hereinafter affirmatively admitted to be true.

VIII.

Defendant denies paragraph VIII of plaintiff's complaint herein filed in the above entitled cause and each and every allegation thereof, except that defendant admits that, during all the times mentioned in plaintiff's complaint herein filed in the above entitled cause, the defendant has refused and still refuses to pay the said sum of five thousand dollars, or any part thereof, to the said plaintiff.

Defendant, for a further and separate answer and defense to the alleged cause of action set forth in



plaintiff's complaint herein filed, alleges as follows:

I.

That, during all the times herein mentioned, defendant was, and still is, a corporation incorporated, organized, and existing under and by virtue of the laws of the State of New York, with its principal office and place of business in the City of New York and State of New York, and has complied with all the requirements of the laws of the State of Oregon governing and regulating foreign insurance companies operating within the State of Oregon, and was, during all the times herein mentioned, and still is, authorized and licensed to transact a general life insurance business within the State of Oregon.

II.

That, heretofore and on or about the 16th day of March, 1911, one George S. Moats, made a formal application, at La Grande, Oregon, to one H. P. Lewis, for two life insurance policies of five thousand dollars each in the New York Life Insurance Company, defendant herein, and thereupon and on the same day, to wit: the 16th day of March, 1911, appeared before one Dr. H. L. Underwood, medical examiner for the New York Life Insurance Company at La Grande, Oregon, and falsely and fraudulently represented as follows, to wit:

"9. Have you ever had or suffered from any of the following diseases?

Answer "Yes" or "No" to each part of this query below.

(Give explicit answers and particulars in each case

—the examiner should satisfy himself that the applicant gives full and careful answers to this question.)

“Yes” Name of No. of Date-Duration-Severity-  
Results or “No” Disease Attacks

A Of the No

Brain or

Nervous

System

B. Of the No

Heart or

Lungs?

C. Of the No

Stomach,

Liver,

Kidneys,

or Bladder?

D. Of the No

Skin, Middle

Ear or Eyes?

E. Rheuma- No

tism or Gout?—”

“10. A. Have you ever suffered from any disease not mentioned above?

B. Have you ever had any accident?

“11. A. Have you ever been under the care of or consulted a physician concerning yourself for any cause within five years?

B. If so, for what ailment; name and address of physician?

A. Nothing except grippe and acute dysentery

B. No.

—”

A. Once 3 yrs. ago.  
and acute dysentery

B. A pain in the back  
N. Moliter, La Grande,

—————”

### III.

That all of the above answers to the said interrogatories were false and fraudulent in that the applicant at the time of his medical examination was, and for a long time prior thereto had been, suffering with a serious nervous and mental disability, of which condition the said George Scott Moats, deceased, and the plaintiff herein had knowledge, prior to Mar. 16, 1911, and had at various times within the five years immediately prior thereto consulted several practicing physicians concerning his physical health and more particularly concerning said serious nervous and mental disability, of which facts the said George Scott Moats, deceased, and the plaintiff herein, had knowledge prior to Mar. 16, 1911, and did, on the morning of the 16th of March, 1911, the very day on which the said application for insurance was made, and immediately prior to making the said application consult a physician concerning said serious nervous and mental disability, of which facts the

plaintiff herein had knowledge at said time.

#### IV.

That all of said false and fraudulent representations, so made, were made for the purpose of deceiving the defendant herein, which said false and fraudulent representations did deceive the defendant herein, and the said defendant, relying upon said false and fraudulent representations, so made, and believing the same to be true, and having no knowledge of the false and fraudulent character of the said representations, and having no means of ascertaining the false and fraudulent character of said representations, did make, execute, and deliver unto the said George S. Moats, as of the date of March 16, 1911, and instrument purporting to be a contract of life insurance, which instrument was in words, letters, and figures substantially the same as the alleged contract hereinbefore set forth in paragraph II of plaintiff's complaint herein filed in the above entitled cause, but that said instrument purporting to be a contract, so made, executed, and delivered by the said defendant to the said George S. Moats, was made, executed, and delivered by the defendant to the said George S. Moats relying upon the false and fraudulent representations of the said George S. Moats, as hereinbefore set forth in paragraph II of this further and separate answer and defense, and that said defendant would not have made, executed, and delivered said alleged contract to the said George S. Moats, if it had known of the false and fraudulent character of said representations and of the serious nervous and mental disability

with which the said George S. Moats was afflicted at the time of his application for said instrument purporting to be a contract of insurance.

#### V.

That, subsequent to the 16th day of March, 1911, and on or about the 10th day of April, 1911, the said George S. Moats, being then violently insane, was committed to the Oregon State Insane Asylum at Salem, Oregon, from which place he was discharged on or about the 4th day of May, 1911, but that, subsequent to the said 4th day of May, 1911, and on or about the 4th day of June, 1911, the said George S. Moats was again confined in the Oregon State Insane Asylum, at which place he died on or about the 14th day of June, 1911, as a result of exhaustion, produced by violent insanity.

#### VI.

That the defendant herein had no knowledge of the serious nervous and mental disability from which the said George S. Moats was suffering on the 16th day of March, 1911, at the time of making application for insurance in the New York Life Insurance Company, and had no means of ascertaining the facts concerning said serious nervous and mental disability until on or about the 1st day of August, 1911, when the said defendant was furnished with proofs of death of the said George S. Moats by the plaintiff herein, from which said proofs of death it appeared that the said George S. Moats had, on and before the 16th day of March, 1911, consulted a practicing physician with reference to the subject of said serious nervous and



mental disability, and that, upon the discovery of said fact by virtue of said proofs of death, and when, upon further investigation, it appeared that the said George S. Moats had at various times immediately prior to the 16th day of March, 1911, consulted other physicians with reference to said serious nervous and mental disability, all of which facts the said George S. Moats falely and fraudulently concealed from the defendant herein and from its medical examiner, and as an inducement to said defendant to believe and rely upon his said statements to its medical examiner, said Moats then and there represented and declared to said defendant that each and all of his said answers to said medical examiner were full, complete, and true; that thereupon and on, to wit: the 23rd day of August, 1911, said defendant elected to and did rescind said contract on the ground that the same was induced by fraudulent misrepresentations, of which said rescission it there and then duly notified the plaintiff; that said application of said George S. Moats was for insurance in the sum of ten thousand dollars in two policies of five thousand dollars each, one payable to the said plaintiff as beneficiary and the other payable to Ida M. Moats as beneficiary; that the first annual premium on said two policies was the total sum of \$268.30, that is to say, \$134.15 for each policy; that said Moats paid said first annual premium on said policies and no more; that thereupon and on said 23rd day of August, 1911, said defendant, at the same time that it notified the plaintiff of said rescission of said contract there and then duly tendered to

her personally and as guardian for her said son, return of the said sum of \$268.30, with legal interest thereon from the 16th day of March, 1911, to said 23rd day of August, 1911, making a total sum of \$275.48 so duly tendered to her, and there and then offered to do any other or further thing, if any, the said defendant ought to do in order to restore the status quo as of the 16th day of March, 1911, but said plaintiff refused to receive said sum so tendered to her.

VII.

That said defendant now here brings into court said sum of \$275.48 for the use and benefit of the plaintiff personally, and as the guardian of her said son, George Albert Moats, and offers to do any other matter or thing, if any, defendant ought to do for the purpose of restoring the status quo as of the said 16th day of March, 1911.

WHEREFORE, the defendant prays that this action be dismissed, and that it have and recover of and from the plaintiff herein its costs and disbursements herein incurred.

PLATT & PLATT and HUGH MONTGOMERY,  
Attorneys for Defendant.

[Endorsed]: Answer. Filed Dec. 30, 1911.

G. H. MARSH,  
Clerk District of Oregon.

And afterwards, to wit, on the 21 day of March, 1912, there was duly filed in said Court, a Reply, in words and figures as follows, to wit:

[Reply.]

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, (a  
corporation),  
Defendant.

Comes now the plaintiff and for her reply to the  
answer of the defendant, admits, denies and alleges  
as follows:

I.

Admits Paragraph one of the further and separate  
answer.

II.

Denies each and every allegation contained in para-  
graph two, of the further and separate answer, and  
every part thereof.

III.

Denies each and every allegation contained in para-  
graph three of the further and separate answer.

IV.

Denies each and every allegation contained in para-  
graph four of the further and separate answer, except  
that plaintiff admits that a policy of insurance was  
issued as of the date March 16th, 1911, as set forth  
in the complaint.

## V.

Denies each and every allegation contained in paragraph five, except that plaintiff admits that the said George S. Moats, died on or about the 14th day of June, 1911.

## VI.

Denies each and every allegation contained in paragraph six of the further and separate answer.

## VII.

Denies any knowledge or information sufficient to form a belief as to whether or not the facts alleged in paragraph seven are true, and therefore denies the same.

WHEREFORE plaintiff prays judgment as in her complaint.

COCHRAN & COCHRAN,

Attorneys for Plaintiff.

[Endorsed]: Reply. Filed Mar. 21, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 27 day of May, 1912, the same being the 2 Judicial day of the Regular Pendleton, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**[Record of Trial, May 27, 1912—Motion for Directed Verdict Denied.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, as guardian of the person and estate of GEO. A. MOATS, a minor person,  
Plaintiff,

v.

NEW YORK LIFE INSURANCE COMPANY,  
No. 3874.  
May 27, 1912.

and

IDA M. MOATS,  
Plaintiff,

v.

NEW YORK LIFE INSURANCE COMPANY,  
No. 3875.  
May 27, 1912.

Now, at this day, the above entitled cause coming on for trial, plaintiff appearing by Mr. C. E. Cochran, of counsel and defendant appearing by Mr. R. T. Platt, Mr. Hugh Montgomery, and Mr. Frank B. Thompson, its attorneys; and it appearing to the Court that the defendant in said cases is the same, the issues presented by the pleadings are the same, and neither of the parties objecting, it is now Ordered that the said causes be and they are hereby consolidated for trial before one jury to be regularly empaneled, and said jury to return upon the testimony offered two verdicts one in each of the above entitled cases; it is further ordered in view of said consolidation for trial that the plaintiffs have double the usual number of peremptory challenges allowed by law and the defendant likewise.



It is further ordered, on motion of the defendant, that the defendant have leave to amend its answer in this cause by interlineation, and thereupon the defendant tenders to the plaintiff the sum of \$287.78 for the benefit of the plaintiff, and now comes a jury of 12 good and lawful men of this district, chosen by the parties, empaneled and sworn to try the issues in this cause, viz: K. G. Warner, E. W. McComas, John S. Norvall, Frank Gritman, Wm. H. McCarmach, Thomas Thompson, Chas. Chaney, E. H. Summer-ville, C. H. Rosenburg, Chas. McBee, F. E. Judd, and W. R. Withie; and thereupon the plaintiff concludes her testimony and rests, and the defendant duly moves the Court for an order directing the jury to return a verdict for the defendant which, after argument of counsel for respective parties and after due consideration, the Court finds is not well taken, and it is Ordered that said motion for that motion for directed verdict be and the same is hereby overruled.

Whereupon the defendant introduced testimony, and the hour of adjournment having arrived it is Ordered that this cause be and the same is hereby continued for further trial until Tuesday, May 28, 1912, at 10 A. M.

And afterwards, to wit, on Wednesday, the 29 day of May, 1912, the same being the 4 Judicial day of the Regular Pendleton, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit: "

**[Record of Trial, May 29, 1912,—Motion for Directed  
Verdict Denied and Verdict.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, as guardian,

v.

NEW YORK LIFE INSURANCE COMPANY,

No. 3874.

May 29, 1912.

and

IDA M. MOATS,

v.

NEW YORK LIFE INSURANCE COMPANY,

No. 3875.

May 29, 1912.

These cases came on regularly at this time for further trial; pursuant to continuance: jury and attorneys for respective parties present as heretofore and thereupon Fred H. Drake sworn for defendant and thereupon defendant rests and thereupon Ida M. Moats recalled and examined and Wm. R. Chattie, J. H. Newbill, D. R. McKenzie, were sworn and examined on behalf of plaintiff in rebuttal and thereupon evidence closed and defendant moves for directed verdict in favor of the defendant and thereupon after argument of counsel for respective parties motion ordered submitted and by the Court taken under advisement; and thereupon after due consideration it is Ordered that said motion for directed verdict be and the same hereby is denied and thereupon after

argument of counsel for respective parties and instructions of the Court the jury retired in charge of the duly sworn officers of the Court to consider of their verdicts and thereupon said jury having agreed returned into Court their verdicts as follows:

IDA M. MOATS, Guardian of the estate of  
GEORGE ALBERT MOATS, a Minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE CO., a corporation,  
Defendant.

### VERDICT.

"We, the jury in the above entitled cause, find a verdict in favor of the plaintiff in the sum of \$5000.00.

E. W. McCOMAS,  
Foreman:"

and

IDA M. MOATS,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation,  
Defendant.

### VERDICT.

"We, the jury in the above entitled cause find a verdict in favor of the plaintiff in the sum of \$5000.

E. W. McCOMAS,  
Foreman:"

and thereupon it is Ordered that judgments enter in accordance with verdicts herein and it is further Ordered that defendant have and hereby is granted 10 days within which to further move herein.

And afterwards, to wit, on Wednesday, the 29 day of May, 1912, the same being the 4 Judicial day of the Regular Pendleton, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**[Judgment Entry.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, as guardian, of the estate of  
GEORGE ALBERT MOATS, a Minor,

v.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation:

No. 3874.

May 29, 1912.

Now, at this day in accordance with the verdict herein it is Considered Ordered and Adjudged that the said plaintiff Ida M. Moats, as guardian, of the estate of George A. Moats, a minor person, have and recover of and from the said defendant, New York Life Insurance Company, a corporation, the sum of \$5000.00 together with the costs and disbursements taxed herein at \$.....

And afterwards, to wit, on the 31 day of May, 1912, there was duly filed in said Court, a Motion, in words and figures as follows, to wit:

**[Motion for Judgment Notwithstanding the Verdict.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a Minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,  
Defendant.

MOTION.

Now comes the defendant in the above entitled cause, appearing by Platt & Platt and Hugh Montgomery, its attorneys of record, and moves the Court for a judgment against the plaintiff above named, and in favor of the defendant above named, non obstante verdicto, upon the ground and for the reasons:

That it appears from the uncontradicted evidence introduced upon trial of the above entitled cause that the alleged policy of insurance, introduced by the plaintiff upon the trial of the above entitled cause, was not delivered to the insured, his beneficiary, or agent, until the 8th day of April, 1911; and

That it further appears from the uncontradicted evidence introduced upon the trial of the above entitled cause that the insured was, on the 21st day of March,



1911, confined to a sanatorium, and was, at the time of said confinement, insane; and

That it further appears from the uncontradicted evidence introduced upon the trial of the above entitled cause that the policy of insurance contracted for was not to take effect until the date of delivery.  
PLATT & PLATT and HUGH MONTGOMERY,

Attorneys for Defendant.

And afterwards, to wit, on Monday, the 8 day of July, 1912, the same being the 6 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

**[Order Overruling Motion for Judgment Notwithstanding the Verdict.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, as guardian,

vs.

NEW YORK LIFE INSURANCE CO.,

No. 3874.

July 8, 1912.

This cause heretofore submitted upon motion for judgment notwithstanding verdict came on regularly at this time for the decision and ruling of the Court; whereupon after due consideration, it is Ordered that said motion for judgment notwithstanding verdict be and the same hereby is denied.

And afterwards, to wit, on the 8 day of July, 1912, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[**Opinion.**]

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE CO.,

Defendant.

COCHRAN & COCHRAN, Attorneys for Plaintiff.

PLATT & PLATT, Attorneys for Defendant.

R. S. BEAN, District Judge:

Actions on two policies on the life of George S. Moats, issued by the defendant company, and consolidated and tried before the jury.

At the conclusion of the testimony the defendant moved for a directed verdict on the ground (1) that the assured made untrue and false statements in his application for insurance, concerning his health and having consulted a physician, And (2) that five days after the date of the application and prior to the delivery of the policy, the assured became ill with a serious mental and nervous disorder which required his confinement in a sanatorium and from the effects of which he died shortly after the delivery of the policy. The motion was overruled on the first point for the reason that the evidence was conflicting and present-

ed a question for the jury. The Court reserved its opinion on the second.

The jury having found verdicts in favor of the plaintiff the defendant now moves for judgment in its favor notwithstanding the verdicts, on the ground that the assured was not in sound health and insurable condition at the time of the delivery of the policy, which fact was not disclosed to the company.

No such defense is pleaded. In the application it is stated that "the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime and, unless otherwise agreed in writing the policy shall then relate back to and take effect as of the date of the application." Contracts of insurance often provide that the policy shall take effect only upon the payment of the first premium and delivery of the policy during the lifetime of the insured "in sound health and insurable condition." In such case a material change in the health of the assured between the date of the application and the delivery of the policy not disclosed to the company will, perhaps, void the policy. *Cable vs. U. S. Life Ins. Co.*, 111 Fed. 19. But in the case at bar the taking effect of the policy is by the contract made to depend only upon the payment of the first premium and the delivery of the policy during the lifetime of the assured. This condition was complied with and the policy related back and took effect as of the date of the application and became effective from that date, notwithstanding there was a material change in the

health of the assured between the time of the application and the delivery of the policy. *Going vs. Mutual Benefit Life Ins. Co.*, 36 S. E. 556; *Greer vs. Mutual Life Ins. Co.*, 44 S. E. 28.

The motion is therefore overruled.

[Endorsed]: Opinion. Filed July 8, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 9 day of July, 1912, there was duly filed in said Court, a Motion for New Trial, in words and figures as follows, to wit:

**[Motion for New Trial.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORE A. MOATS, a Minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

NOW COMES the defendant in the above entitled cause appearing by Platt & Platt and Hugh Montgomery, its attorneys of record and petitions the court for a new trial in the above entitled cause upon the ground and for the reasons:

I.

That it appears from the uncontradicted evidence introduced without objection upon the trial of the

above entitled cause that the alleged policy of life insurance introduced in evidence by the plaintiff upon the trial of the above entitled cause was not delivered to the insured, his beneficiary, or agent or other person or persons acting for him until the 6th day of April, 1911, and that prior to the 6th day of April, 1911, and before the delivery of said alleged policy of life insurance which was the basis of the above entitled action, and on or about the 21st day of March, 1911, the insured was confined to a sanatorium conducted for mental and nervous diseases and was at the time of said confinement, insane.

## II.

That it further appears from the evidence of the plaintiff introduced upon the trial of the above entitled cause that said alleged policy of life insurance was not signed until the 25th day of March, 1911, and that prior to the signing of said alleged policy of life insurance as shown by the evidence introduced on behalf of the defendant in the above entitled cause, which evidence was not contradicted, and on or about the 21st day of March, 1911, the insured was confined to a sanitarium conducted for nervous and mental diseases and was at the time of such confinement, insane.

## III.

That it further appears from the uncontradicted evidence introduced by defendant upon the trial of the above entitled cause that the alleged policy of life insurance contracted for was not to take effect until the date of delivery, and it appears from the face of



said alleged policy of life insurance introduced by the plaintiff upon the trial of the above entitled cause that the same was not to take effect until after delivery, and that it appears from the uncontradicted evidence of the case that before the delivery of said alleged policy of life insurance and before the signing of said alleged policy of life insurance and on or about the 21st day of March, 1911, the insured was confined to a sanitarium for mental and nervous diseases and was at the time of such confinement, insane.

#### IV.

That the verdict rendered against the defendant in the above entitled cause was contrary to and against the weight of evidence introduced upon the trial of the above entitled cause.

WHEREFORE defendant petitions and respectfully prays that the verdict rendered in the above entitled cause and the judgment entered thereon be set aside and a new trial granted.

PLATT & PLATT and HUGH MONTGOMERY,

Attorneys for Defendant.

[Endorsed]: Petition. Filed July 9, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 5 day of August, 1912, the same being the 29 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceeding were had in said cause, to-wit:

**[Order Overruling Motion for New Trial.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, as guardian,

v.

NEW YORK LIFE INSURANCE CO.

No. 2874.

August 5, 1912.

This cause heretofore submitted upon motion for a new trial came on regularly at this time for the decision of the Court: whereupon after due consideration, It is Ordered that said motion for new trial be and the same hereby is denied.

And afterwards, to wit, on the 9 day of September, 1912, there was duly filed in said Court, a Bill of Exceptions, in words and figures as follows, to wit:

**[Bill of Exceptions.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

BE IT REMEMBERED, that on the 27th day of May, A. D., 1912, at the regular term of the above

entitled court held at the City of Pendleton, State of Oregon, the above entitled cause came on for trial before the Hon. Robert S. Bean, Judge presiding, when the following proceedings were had, to-wit:

A jury was impaneled and sworn according to law and thereupon the plaintiff, after the opening statements of the respective attorneys of record, to sustain the issues upon her part, offered the testimony of the following witnesses as her evidence in chief:

MRS. IDA MAY MOATS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. COCHRAN):

Q. Mrs. Moats, are you acquainted with—were you acquainted with George Scott Moats in his life time?

A. I was.

Q. What relation was he to you?

A. He was my husband.

Q. At and prior to his death?

A. He was my husband.

Q. Did you have any children, the issue of that marriage?

A. I had two. I lost one. I have one little boy left.

Q. What is his name?

A. George Albert Moats.

Q. George Albert Moats?

A. George Albert Moats.

Q. Mrs. Moats, I submit to you two documents which the reporter has marked for identification "Plaintiff's Exhibit 1 and 2," and allow me to ask you whether or not those are the documents that were delivered to you by Mr. Lewis, purporting to be the policies in this case?

A. They are.

Mr. COCHRAN: We offer the documents in evidence. Insurance Policies marker "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 2."

Of which Exhibit 2 the following is a copy:

NEW YORK LIFE INSURANCE COMPANY.

BY THIS POLICY OF INSURANCE AGREES TO PAY Five Thousand Dollars at the Home Office of the Company in the City and State of New York, to George A. Moats, son of the insured beneficiary, with right of revocation, upon receipt at said Home Office of due proof of the death, during the continuance of this contract, of George S. Moats, the Insured.

This contract is made in consideration of the first premium of One Hundred Thirty-four 15|100 Dollars, the receipt of which is hereby acknowledged, constituting payment for the period terminating on the Sixteenth day of March in the year Nineteen Hundred and Twelve and the payment of a like sum on said date and on the Sixteenth day of March in every year thereafter during the continuance of this Policy, until the death of the Insured; but after one full annual premium has been paid, the Company, by endorsement on this Policy, will waive payment of

premiums under the conditions stated in Section 7 on the next page, entitled "Waiver of Premiums."

THIS POLICY SHALL PARTICIPATE IN THE SURPLUS OF THE COMPANY.

The proportion of divisible surplus accruing on this Policy shall be ascertained and distributed annually and not otherwise, and at the option of the Insured shall each year, on the anniversary of the Policy, be either

- (1) Paid in Cash; or,
- (2) Applied toward the payment of any premium or premiums; or,
- (3) Applied to the purchase of participating Paid-up Additions to the Policy; or,
- (4) Left to accumulate to the credit of the Policy, with compound interest at the rate of three per centum per annum, and payable at the maturity of the Policy, but withdrawable on any anniversary of the Policy.

Unless the Insured shall elect otherwise within three months after the mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of participating Paid-up Additions (Option No. 3) which may be surrendered for cash at any time and the Cash Value thereof shall not be less than the original cash dividend.

The benefits and provisions printed or written by the Company on the following pages, are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.



After delivery of this Policy to the Insured, it takes effect as of the Sixteenth day of March, Nineteen Hundred and Eleven.

In Witness Whereof the NEW-YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Twenty-fifth day of March, Nineteen Hundred and Eleven.

DARWIN P. KINGSLEY,

President.

SEYMOUR M. BALLARD,

Secretary.

Examined,

I. W. S.

Wm. W. FERRIER,

Registrar.

AR Age 33; Insurance Payable at Death: Premiums Payable During Life: Annual Dividend. 910-404.

#### BENEFITS AND PROVISIONS.

1. THE CONTRACT.—This Policy is free of conditions as to residence, travel or occupation. The Policy constitutes the entire contract between the parties, and no agent is authorized to waive forfeitures or to make, modify or discharge contracts, or to extend the time for paying a premium.

2. INCONTESTABILITY.—This Policy shall be incontestable after one year from its date of issue except for non-payment of premium.

3. SELF-DESTRUCTION. — Self- Destruction during the first Policy year, whether the insured be sane or insane, is a risk not assumed by the Company;

but in such case the Company will return the premiums actually received.

4. AGE.—If the age of the Insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

5. PAYMENT OF PREMIUMS.—All premiums are payable at the Home Office of the Company or to an agent of the Company upon delivery of a receipt, on or before the date due, signed by an Executive Officer of the Company, namely, the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer, and countersigned by said agent. The premium is always considered as payable annually, in advance, but by agreement in writing and not otherwise may be made payable in semi-annual or quarterly payments. Any unpaid premiums required to complete the payments for the current policy year in which death occurs shall be deducted from the amount payable hereunder. The payment of a premium shall not maintain the policy in force beyond the date when the next payment is due, except as hereinafter provided.

6. GRACE.—A grace of one month (not less than thirty days) subject to an interest charge of five per centum per annum will be allowed for the payment of every premium after the first, during which time the insurance shall continue in force. If death occurs within the period of grace the unpaid premium for the then current Policy year shall be deducted from the amount payable hereunder.

7. WAIVER OF PREMIUMS.—The Company, by endorsement hereon, will waive payment of the premiums thereafter becoming due, if the insured, before attaining the age of sixty years and after paying at least one full annual premium and before default in the payment of any subsequent premium, shall furnish proof satisfactory to the Company that he has become wholly and permanently disabled by bodily injury or by disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit, or from following any gainful occupation. Any premiums so waived shall not be deducted from the sum payable under the Policy, and the values provided for in Section "12. Cash Loans," and Section "15. Benefits on Surrender or Lapse," shall be the same as if such premiums had been paid in cash. Provided that, notwithstanding proof of disability may have been accepted by the Company as satisfactory, the Insured shall at any time, on demand, furnish the Company satisfactory proof of the continuance of such disability; and if the Insured shall fail to furnish such proof, or if it shall appear to the Company that the Insured is able to perform any work or to follow any occupation whatsoever for compensation, gain or profit, all premiums thereafter falling due must be paid in conformity with this contract.

Without prejudice to any other cause of disability, the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands above the wrists, or of both feet above the ankles, or of one entire hand

and one entire foot will be considered as total and permanent disability within the meaning of this provision.

8. CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the Insured, if there be no existing assignment of the Policy made as herein provided, may, while the Policy is in force, designate a new beneficiary, with or without reserving right of revocation, by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable endorsement thereon. Such change shall take effect when endorsed on the Policy by the Company and not before. If any beneficiary shall die before the Insured, the interest of such beneficiary shall vest in the Insured.

9. PRIVILEGE OF CHANGE TO OTHER FORMS OF POLICIES.—At any time, and while in full force, and provided the Insured is then less than 60 years of age, this Policy may be changed without medical re-examination for a Policy of the same amount, upon any plan issued by the Company at the time this Policy takes effect and having a higher rate of premium. Such change shall be effective upon payment of a sum equal to the difference between the premiums on the new Policy and the premiums paid on this Policy, with compound interest at the rate of five per centum per annum from the due date of each payment to the date when the change is made, and upon the surrender of this Policy. The new Policy will



take effect as of the date of this Policy, and the premium will be based upon the same age as this Policy. The cash value of any dividends standing to the credit of this Policy, as well as any additional cash value of such dividends that would have been credited under the new Policy may be used in the settlement of the difference of premiums.

10. REINSTATEMENT.—At any time after any default, upon written application by the Insured and upon presentation at the Home Office of evidence of insurability satisfactory to the Company, this Policy may be reinstated, together with any indebtedness in accordance with the loan provisions of the Policy, upon payment of arrears of premiums with interest thereon at the rate of five per centum per annum.

11. ASSIGNMENT.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility as to the validity of any assignment.

12. CASH LOANS.—At any time after two full years' premiums have been paid and while this Policy is in full force, the Company will advance, on the pledge of the Policy and on the sole security thereof, an amount which, with interest thereon to the end of the current policy year and with any unpaid portion of said year's premium, shall, at the option of the owner, be equal to or less than the Cash Surrender Value at the end of such Policy year, including the Cash Surrender Value of any dividend additions. Interest on the loan will be at the rate of five per centum



payable annually; if interest is not paid when due, it shall be added to the principal and bear interest at the same rate. Failure to repay any such advance or to pay interest shall not avoid this Policy unless the total indebtedness hereon to the Company shall equal its Cash Surrender Value, nor until one month after notice of such fact shall have been mailed by the Company to the last known address of the Insured and of the Assignee of record at the Home Office of the Company, if any, in which event the Policy shall become void.

13. **PREMIUM LOANS.**—Whenever the net loan value of this Policy shall be sufficient to pay one full annual premium with five per centum interest thereon for one year, the Company will, before the expiration of the days of grace, accept a premium lien note of the owners of the Policy in lieu of cash for premium, said note to be a lien against the Policy and subject to the same terms and conditions as cash loans except that the Policy need not be deposited with the Company as a pledge. The total indebtedness on this Policy, however incurred, shall never exceed its Cash Surrender Value.

14. **PAID-UP AND ENDOWMENT OPTIONS**—Whenever the reserve on this Policy together with the reserve on existing dividend additions, if any, at the end of any policy year shall equal or exceed the net single premium for the attained age of the Insured by the American Experience Table of Mortality and interest at three per centum, for an amount of insurance equal to the face amount of this Policy, pay-

able at the same time and under the same conditions as this Policy, the Company, at the written request of the Insured, will endorse the Policy as participating paid-up insurance for such amount as the said reserve will purchase when thus applied, any indebtedness to the Company to be a lien against said paid-up insurance upon the same terms and conditions as in Section 12 above; or, whenever said reserve at the end of any policy year shall equal or exceed the face amount of this Policy, the Company, upon surrender of the Policy and all claims thereunder, will pay in cash the face amount of the Policy and any excess of said reserve, less any indebtedness to the Company on account of this Policy.

#### 15. BENEFITS ON SURRENDER OR LAPSE.

After two full annual premiums shall have been paid, the owner may elect within three months after any default in payment of premium, but not later, either

(a) To accept the Cash Surrender Value; or,

(b) To have insurance for the face amount of this Policy plus any dividend additions and less any indebtedness to the Company hereon continue in force from the date of default for such term as the Cash Surrender Value will purchase as hereinafter provided, but without future participation and without the right to loans or Cash Surrender Value; or,

(c) To purchase non-participating Paid-up Insurance payable at the same time and on the same conditions as this Policy. The Insured may at any time obtain a loan on such Paid-up Insurance in accordance with the provisions contained in Section "12. Cash Loans," or surrender the Policy for its Cash Surrender Value.

THE CASH SURRENDER VALUE, after premiums have been paid for two years or more, will be the reserve on this Policy, and the reserve on any dividend additions thereto, at the date of default, computed according to the American Table of Mortality and interest at the rate of three per centum per annum, less the amount of any indebtedness to the Company, and less a surrender charge which in no case shall be more than one and one-half per centum of the sum insured; after premiums have been paid for ten years or more there will be no surrender charge.

#### BENEFITS AND PROVISIONS—Continued.

The Term for which said insurance will be continued, or the amount of Paid-up Insurance will be such as said Cash Surrender Value will purchase as a net single premium at the age of the Insured at the date of default according to the American Table of Mortality and interest at the rate of three per centum per annum. If the Insured shall not, within three months after default, surrender this Policy to the Company at the Home Office for its Cash Surrender Value as provided in option (a) or for paid-up insurance as provided in option (c), the insurance will be continued as term insurance as provided in option (b).

The figures contained in the following "Table of Loan and Surrender Values" represent the actual amounts available after deduction of the surrender charge, if any, and are computed in accordance with the above provisions and upon the assumptions that premiums have been paid in full for the number of years stated in the table, and that there is no indebtedness on the policy, and that there are no outstanding dividend additions.

TABLE OF LOAN AND SURRENDER VALUES.

The Cash Surrender, Loan and Paid-up Insurance values stated in the following table apply to a policy of \$1,000. As this Policy is for \$5000, the Cash Surrender Value and Loan Value (Col. 1), and the Paid-up Insurance (Col. 2), will be five times the amounts stated in the table; the periods of Continued Insurance (Col. 3), must not be multiplied or increased.

After Policy Has Been in Force.	Column 1. CASH SUR- RENDER VALUE LOAN VALUE*	Column 2. PAID-UP LIFE IN- SURANCE.	Column 3. \$5000 INSUR- ANCE CONTINUED FOR.	
			Yrs.	Mos.
2	\$ 12	\$ 27	1	4
3	30	69	3	5
4	40	92	4	7
5	52	119	6	0
6	66	147	7	6
7	83	180	9	2
8	100	213	10	8
9	117	246	12	1
10	135	277	13	3
11	150	304	14	0
12	166	330	14	8
13	182	355	15	2
14	199	380	15	7
15	216	405	15	11
16	234	429	16	2
17	251	453	16	4
18	269	476	16	5
19	287	499	16	6
20	306	521	16	6
21	324	542	16	5
22	343	563	16	4
23	362	583	16	2
24	381	603	16	0
25	400	622	15	10
Years.				

Values for later years will be computed upon the above basis, and will be furnished on request.

\*The Loan Values in the above table are the maximum amounts available at the **end** of the policy year indicated. Loans may also be obtained **during** the policy year as set forth in Section 12 entitled "Cash Loans."

Edition July, '10. O. L. 1,000. 33.

16. MODES OF SETTLEMENT UPON DEATH OF INSURED. If there be no existing assignment of the Policy made as herein provided, the Insured or in case the Insured shall have made no election, the Beneficiary after the Insured's death, may by written notice to the Company at its Home Office, elect to have the net sum payable under this Policy upon the death of the Insured paid either in cash or as follows:

- (1) By the payment of interest at the rate of three per centum of such net sum, payable one year after receipt and approval of proofs of death, and at the end of each year thereafter during the lifetime of the beneficiary and, unless otherwise directed in said notice, by the payment upon the death of the beneficiary of the said net sum, together with any accrued interest for the year then current, to the beneficiary's legal representatives or assigns.

10404

- (2) By the payment of equal annual installments for specified number of years, the



first installment being payable immediately in accordance with the following Installment Table, either to the beneficiary, or if there be more than one beneficiary, to the beneficiaries jointly and to the survivor.

- (3) By the payment of equal annual installments for a fixed period of twenty years and for so many years longer as the beneficiary shall survive, the first installment being payable immediately, in accordance with the following Installment Table. If there be more than one beneficiary, the proceeds of this Policy, unless otherwise directed in said notice, shall be considered as divided into equal parts. The amount payable to each such beneficiary, shall be determined in accordance with the following Installment Table for the ages attained by said beneficiaries.

Any installments payable under (2) or (3), which shall not have been paid prior to the death of the beneficiary shall be paid, unless otherwise directed in said notice, to the beneficiary's legal representatives or assigns.

INSTALLMENT TABLES.—Installment payments under any option may be made annually, semi-annually, quarterly or monthly; the minimum basis of such payments will be \$50 when paid annually, \$25 when paid semi-annually, \$15 when paid quar-

terly, or \$10 when paid mothly, and the total of the fractional payments each year shall equal the annual payment each year as shown in the following tables, which are based upon a Policy, the proceeds of which are \$1,000. The figures contained in the table will apply pro rata to this Policy.

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Option (2)

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Number of Annual Instalments.	Amount of each Annual Installment.
2	\$507.39
3	343.23
4	261.19
5	211.99
6	179.22
7	155.83
8	138.30
9	124.69
10	113.81
11	104.92
12	97.53
13	91.29
14	85.94
15	81.32
16	77.29
17	73.74
18	70.59
19	67.78
20	65.25
21	62.98
22	60.91
23	59.04
24	57.32
25	55.75

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## Option (3).

Age of Beneficiary at death of insured.	Amount of each annual instalment.	Age of beneficiary at death of insured	Amount of each annual instalment.	Age of beneficiary at death of insured	Amount of each annual instalment.
0	\$42.48	25	\$43.16	50	\$56.60
1	40.17	26	43.49	51	57.29
2	39.38	27	43.84	52	57.98
3	39.06	28	44.20	53	58.66
4	38.93	29	44.58	54	59.32
5	38.91	30	44.98	55	59.96
6	38.96	31	45.39	56	60.58
7	39.05	32	45.82	57	61.16
8	39.19	33	46.27	58	61.72
9	39.35	34	46.73	59	62.23
10	39.52	35	47.22	60	62.71
11	39.70	36	47.73	61	63.15
12	39.88	37	48.25	62	63.54
13	40.08	38	48.79	63	63.89
14	40.28	39	49.36	64	64.20
15	40.49	40	49.94	65	64.45
16	40.71	41	50.54	66	64.67
17	40.94	42	51.17	67	64.85
18	41.18	43	51.80	68	64.98
19	41.42	44	52.45	69	65.09
20	41.68	45	53.12	70	65.16
21	41.95	46	53.80	71	65.21
22	42.24	47	54.49	72	65.23
23	42.53	48	55.19	73	65.25
24	42.84	49	55.89	and over	

Unless otherwise specified by the Insured or by the beneficiary in making such election, the beneficiary may at any time surrender the contract guaranteeing the payment of installments for the commuted value of the payments yet to be made, computed upon the same basis as Option (2) in the above table; provided that no such surrender will be made under (3) ex-

cept after the death of the beneficiary occurring within the aforesaid twenty years.

The above Modes of Settlement are based upon an assumed interest earning of 3 per centum, but if in any year the Company shall declare for that year on funds held by it under such Modes of Settlement a greater interest rate than three per centum, the sums payable under Options 1 and 2 and the installments for the fixed period of twenty years under Option 3, shall be increased accordingly.

The above Modes of Settlement are not applicable if the beneficiary be a firm or corporation, nor if the net sum payable under the Policy shall be less than \$1,000.

(On the outside appears the following:)

NEW YORK LIFE INSURANCE COMPANY.

GEORGE S. MOATS.

No. 4 258 253

Amount \$5,000

Annual Premium \$134.15

NOTICE: It is not necessary for the Insured or the Beneficiary to employ the agency of any person, firm or corporation, in collecting the Insurance under this Policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Home Office, 346 and 348 Broadway, New York City.

Oregon Br.

Ordinary Life. 910-404.

D

REGISTER OF CHANGE OF BENEFICIARY.

Note.—No change, designation, or declaration shall take effect until endorsed on this Policy by the Company at the Home Office.

Date Endorsed.	Beneficiary.	Endorsed By
10401		

REGISTER OF CHANGE IN MODE OF PAYMENT OF PROCEEDS UNDER THIS POLICY.

Note.—Changes of Mode of payment and revocation of any change, must be requested in writing and shall not take effect until endorsed on this Policy by the Company at the Home Office.

Date Endorsed.	How Payable.	Endorsed By
10401.		

Mr. COCHRAN: I presume they may be considered read.

COURT: If that is agreeable to counsel.

Mr. PLATT: I don't care about reading them at present.

COURT: Any particular part of the document that you desired to read, you can do that, or read it all if you want to, but it isn't necessary.

Mr. COCHRAN: I will just read the face of the document. There are certain other parts marked "Benefits and Provisions" which are not material in this case.

NEW YORK LIFE INSURANCE COMPANY.

By this policy of insurance agrees to pay

FIVE THOUSAND DOLLARS.

at the Home Office of the Company in the City and



State of New York to George A., son of the insured beneficiary, with right of revocation, upon receipt at said Home Office of due proof of the death, during the continuance of this contract, of

GEORGE S. MOATS, the Insured.

This contract is made in consideration of the first premium of One Hundred Thirty-four 15|100 Dollars, the receipt of which is hereby acknowledged, constituting payment for the period terminating on the Sixteenth day of March, in the year Nineteen Hundred and Twelve and the payment of a like sum on said date and on the Sixteenth day of March, in every year thereafter during the continuance of this Policy, until the death of the Insured; but after one full annual premium has been paid, the Company, by endorsement on this Policy, will waive payment of premiums under the conditions stated in Section 7 on the next page, entitled "Waiver of Premiums."

THIS POLICY SHALL PARTICIPATE IN THE  
SURPLUS OF THE COMPANY.

The proportion of divisible surplus accruing on this policy shall be ascertained and distributed annually and not otherwise, and at the option of the Insured shall each year, on the anniversary of the Policy, be either

- (1) Paid in Cash; or,
- (2) Applied toward the payment of any premium or premiums; or,
- (3) Applied to the purchase of participating Paid-up Additions to the policy; or,
- (4) Left to accumulate to the credit of the Policy,

with compound interest at the rate of three per cent-up per annum, and payable at the maturity of the Policy, but withdrawable on any anniversary of the Policy.

Unless the Insured shall elect otherwise within three months after the mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of participating Paid-Up Additions (Option No. 3) which may be surrendered for cash at any time, and the Cash Value thereof shall not be less than the original cash dividend.

The benefits and provisions printed or written by the Company on the following pages, are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

After delivery of this Policy to the Insured, it takes effect as of the Sixteenth day of March, Nineteen Hundred and Eleven.

IN WITNESS WHEREOF, the NEW YORK LIFE INSURANCE COMPANY has caused this contract to be signed this Twenty-fifth day of March, Nineteen Hundred and Eleven.

DARWIN P. KINGSLEY,

President.

SEYMOUR M. BALLARD,

Secretary.

WILLIAM W. FERRIER,

Registrar.

Exhibit No. 2 is in the same words and figures.

Q. Mrs. Moats, I believe you were appointed by

the County Court of Union County as guardian of your son, were you not?

A. I was.

Q. Now, you may tell the court whether or not you have received payment of either of these policies, either for yourself or as guardian for your son?

A. No, I have not.

Cross Examination.

(Questions by Mr. PLATT):

Q. When were you and Mr. Moats married?

A. We was married 11 years ago.

Q. 11 years ago?

A. Yes, sir.

Q. At that time you were a widow, were you not?

A. Yes, sir.

Q. Of Mr. Wooley?

A. Mr. Woodell.

Q. Mr. Woodell?

A. Yes, sir.

Q. How long had you been a widow?

A. I had been a widow—.

Mr. COCHRAN: We think that is immaterial, your Honor.

COURT: I suppose it is proper cross examination.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

A. I had been a widow just a little over 11 months.

Q. And you were living on the farm there at Sum-

merville?

A. Yes, sir.

Q. And which you inherited from your husband?

A. Yes, sir.

Q. How large a farm was that?

A. 400—.

Mr. COCHRAN: We object to that line of cross examination as being immaterial and improper cross examination.

COURT: Goes to the credibility of the witness.

Mr. COCHRAN: Save an exception.

COURT: Exception is allowed.

A. Shall I answer?

Mr. COCHRAN: Yes.

A. 420 acres.

Q. 420 acres?

A. Yes, sir.

#### Re-Direct Examination.

Q. Mrs. Moats, isn't it a fact, or is it not a fact, that your interest in the land of which you speak is that of a dower?

A. Yes, of course we have the three children.

Q. What are their names?

A. Mamie, Frank and Charley. Charley died in January—last January.

Q. Was the land then owned by the three children of your former husband, subject to your dower?

A. Yes.

#### Re-Cross Examination.

Q. What did you say about one of the children?

I didn't hear that?

A. I said I lost one of my sons in January.

Q. Was he married?

A. No, sir.

Q. You inherited his share, I suppose, in conjunction with his brother and sister?

A. Yes, sir.

Witness excused.

### PLAINTIFF RESTS.

At the close of the foregoing evidence in chief offered by the plaintiff, counsel for the defendant moved the court to direct a verdict for the defendant, submitting the same and the reasons therefor in writing in words and figures as follows, to-wit:

Mr. PLATT: We move that the jury be directed to find a verdict for the defendant on the ground that there have been no proofs of death submitted.

COURT: Isn't that admitted by the pleadings?

Mr. COCHRAN: I understood that it is. If not, quite naturally I desire to do so.

COURT: I was thinking the defendant admitted the death in the pleadings.

Mr. PLATT: We placed in issue all the allegations of the complaint. We will amplify that motion. There has been no proof that the insured named in the policies, Plaintiff's Exhibit 1 and 2, has died, or that the proofs of death therein provided for have been presented to the defendant in accordance with the contract.

Mr. COCHRAN: Paragraph 5 of the complaint is



that "After the death of the said George S. Moats." Now, the answer denies that, except as affirmatively pleaded. Paragraph 5 of the complaint is "After the death of the said George S. Moats and prior to the commencement of this action, to-wit, on or about the 15th day of July, 1911, the said defendant company received at its home office in the City and State of New York, due proof of the death of the said George S. Moats, during the continuance of the said contract of insurance." Now, that is denied except as affirmatively pleaded. Paragraph 5 of the Answer alleges that George S. Moats died on the 14th of June, 1911. I will read paragraph 6 of the Answer. "That the defendant herein had no knowledge of the serious mental and nervous disability from which the said George S. Moats was suffering on the 16th day of March, 1911, at the time of making application for insurance in the New York Life Insurance Company, and had no means of ascertaining the facts concerning the said serious nervous and mental disability until on or about the first day of August, 1911, when the said defendant was furnished with proofs of death of the said George S. Moats by the plaintiff herein, from which said proofs of death it appeared that the said George S. Moats" had done certain things. Now, I take it they cannot pick out the facts they won't admit, and compel us to put them in. The admission couldn't make it any stronger. They also admit the payment of the premium, so it seems to me that is in this case.

Mr. PLATT: If the court please, the paragraph in proof of loss is denied in the reply—denies each and

every allegation in Paragraph 6 of the Further and Separate Answer. That is with reference to the proof of loss.

COURT: Well, the defendant having set up the fact that this assured died, and that proofs of loss were subsequently received by it is sufficient evidence of that fact for this case, whatever the denial may be in the reply. As far as the defendant is concerned, I think it is admitted on the face of the pleadings that the proofs of death were submitted to this company, and received by it, and also that the assured died on a certain date, and the motion, therefore, for a directed verdict will be overruled.

Mr. PLATT: Save an exception.

COURT: The exception is allowed.

The court overruled said motion, stating that defendant could rely upon the same at the close of its evidence, to which ruling of the court counsel for the defendant then and there excepted, which exception was allowed.

The defendant, to sustain the issues upon its part, then, through its counsel, offered the testimony of the following witnesses as its evidence in chief:

DR. HERBERT L. UNDERWOOD, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. In what line of occupation are you at present engaged?

A. Physician.

Q. In what line of occupation were you engaged during the month of March, 1911?

A. Physician and surgeon.

Q. Were you one of the alternate examining physicians for the New York Life Insurance Company, La Grande, Oregon?

A. I was.

Q. I now direct your attention, Doctor, to what purports to be an application for life insurance in the New York Life Insurance Company, purporting to have been signed by George Scott Moats, witnessed by yourself as witness, and ask you if that is your signature?

A. That is my signature, yes.

Q. I will ask you, Doctor, if this document was signed by George S. Moats in your presence?

A. It was.

Mr. MONTGOMERY: I now offer in evidence an application for life insurance in the New York Life Insurance Company, bearing date March 16, 1911, signed by George Scott Moats, applicant, witnessed by H. L. Underwood, and ask that the same be received in evidence.

(Examination by Mr. COCHRAN):

Q. Allow me to ask you, Doctor, whether or not you were present when the first sheet was signed? It appears to be witnessed by some other than yourself.

A. This sheet?

Q. Yes, sir.

A. No, sir, I was not present.

Q. You don't know anything about this?

A. I don't know anything about that.

Q. It is the second sheet——

A. It may be that I looked it over at the time, but I didn't sign or didn't have anything to do with it.

Q. It is the second sheet of the offer that bears——

A. Bears my signature as examining——

Mr. COCHRAN: I understand you offer both.

Mr. MONTGOMERY: I offer the entire instrument as the application.

Mr. COCHRAN: We object to the first sheet, your Honor, as not being sufficiently identified, and to the second sheet because the answer alleges that there was an application made to one H. P. Lewis, and there is no allegation in the answer that the application was made to the New York Life Insurance Company.

Mr. MONTGOMERY: If the Court please, these instruments are composed of two forms, one purporting to be questions propounded by the agent of the defendant company, and the others being the medical examination which is required from the applicant for life insurance, and these have been many times construed to constitute one instrument.

COURT: Let me see those papers. This is the sheet that is filled out by the doctor, and this was signed in his presence?

Mr. MONTGOMERY: Yes.

COURT: The objection will be overruled.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

Application received in evidence and marked "Defendant's Exhibit A."

(Examination by Mr. MONTGOMERY resumed.)

Q. At what time of the day, Doctor, was this instrument signed?

A. It was afternoon, and before two o'clock, some time between twelve and two—the exact time I would not venture to say. My impression would be about one o'clock.

Mr. MONTGOMERY: The instrument just offered in evidence, gentlemen of the jury, and which was received and marked "Defendant's Exhibit A," is an application for insurance in the New York Life Insurance Company, and reads as follows: Thereupon said exhibit, of which the following is a copy, was read to the jury.

1. A. Name of the person applying for insurance.

NOTE.—Write the name in full. George Scott Moats.

B. Residence: State of Oregon, County of Union, Town, Near Summerville.

C. Place of business: Same. Same. Name of firm, No firm.

D. To what address shall notices of premium be sent?

Summerville, Oregon.

2. A. Present occupation, Farming.

B. Other occupation if any.

C. State your exact duties in full. Retiring.



- D. Are you married? Yes.
3. A. Place of birth. Illinois.
- B. Race or nationality. White.
- C. Born on 2nd day of December, 1877.
- D. Age nearest birthday. 33.
4. A. Are you now insured in any Company or Society? (Answer "Yes" or "No") No.
- B. If so, state in what Companies or Societies, and the amount insured in each.
- C. Have you an application now pending in any Company or Society? No.
- D. If so give name of Company or Society.
5. A. Has any company or society ever declined to issue a policy on your life? No.
- B. If so state name of company or society.
6. A. Has any Company or Society ever issued or offered to issue, a policy on your life differing from the one then applied for? No.
- B. If so, state name of Company or Society, and give particulars.
7. A. To whom shall the proceeds of the insurance applied for be payable in event of death?
- NOTE.—iGive Christian names in full. Mrs. Ida May Moats, wife. George Albert Moats, son, 12 years old.
- B. Present residence. Summerville, Oregon.
- C. Relationship to you.
8. Sum to be insured. \$10,000, 2 pols. of \$5,000 each.
- \$5,000 to Mrs. Ida May Moats, \$5000 to George Al-

bert Moats, my son.

Premiums payable annually. On what table? Ordinary life. Life Premiums. Endowment, payable in ..... years.

With..... waiver of premiums in case of permanent total disability.

NOTE.—Strike out the rates and plans not desired.

I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime, and that, unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application. 2. That any payment on account of the first premium before delivery of the policy to me shall be binding on the Company only in accordance with the Company's receipt therefor on the coupon receipt form duly filled out and detached from this application, which is the only authorized form of receipt for such payment. 3. That the agent taking this application has no authority to make, modify or discharge contracts, or to waive any of the Company's rights or requirements.

Dated at La Grande, Org., this 16th day of March, 1911.

Signature of the person applying for insurance.  
(Write the name in full) George Scott Moats.

Witnessed by H. P. Lewis, Agent.

Other Agents.

Names and Residences of three intimate friends:

F. L. Myers, Cashier, La Grande, Org.

D. R. McKenzie, Summerville, Org.

J. M. Choate, Summerville, Org.

STATEMENT TO BE SIGNED BY APPLICANT  
UPON PAYMENT OF THE PREMIUM  
OR ANY PART THEREOF.

Dated at La Grande, Org., March 16th, 1911.

I HEREBY DECLARE that I have paid to H. P. Lewis, Two Hundred Sixty Eight 30|100 Dollars in cash, and that I hold his receipt for the same, made up, without alteration, on the receipt form detached from and corresponding in date and number with this Application. I assent to the terms of said receipt.

(Signature of Applicant): George Scott Moats.

THIS EXAMINATION MUST BE MADE IN PRIVATE; NO AGENT OR THIRD PERSON BEING PRESENT.

(To be filled out by the Medical Examiner only)  
ANSWERS MADE TO THE MEDICAL EXAM-  
INER.

In continuation of and forming a part of my Application for Insurance in the New York Life Insurance Co., dated Mar. 16th, 1911.

1. A. What is your occupation (Full details). A. Farmer.

B. How long have you been engaged in your present occupation? B. 6-7 years.

C. What was your previous occupation? C. Merchant.

D. Do you contemplate making any change, tem-

porarily or permanent, in your occupation? (If so, give full details). D. No.

2. Do you contemplate changing your residence, or making a journey, or is there any probability that you will do either? (If so, give full details). No.

3. In what states have you lived the last ten years, and which years in each. (If outside the U. S., in what countries, and which years in each?) Oregon.

4. A. Have you now any connection, direct or indirect, with the manufacture or sale of wine, spirits or malt liquors? A. No.

B. Have you ever had any such connection? (If so, in either case, give full details). B. No.

5. A. What is your daily consumption of wine, spirits, or malt liquors? A. None.

B. What has it been in the past? B. Not for years. Occasionally a little beer.

C. Have you at any time used alcohol or drugs to excess? C. No.

6. Have you ever raised or spat blood? (If so, give full details.) No.

7. What is the name of the agent who induced you to make this present application? Mr. H. P. Lewis.

8. A. Has any Life Insurance Company ever examined you either on an application for insurance or for any other reason, without issuing a policy? (If so, state name of Company). A. No.

B. Has any Life Insurance Company ever issued or offered to issue a policy on your life differing from the one applied for? (If so, state name of Company,

and give particulars.) B. No.

9. Have you ever suffered from any of the following diseases?

Answer "Yes" or "No" to each part of this query below.

(Give explicit answers and particulars in each case—the Examiner should satisfy himself that the applicant gives FULL and CAREFUL ANSWERS to this question.)

"Yes" or "No" Name of diseases. No of Attacks. Date.

A. Of the Brain or Nervous System? No.

Duration Severity Results.

B. Of the Heart or Lungs? No.

C. Of the Stomach, Liver, Kidneys or Bladder? No.

D. Of the Skin, Middle Ear or Eyes? No.

E. Rheumatism or Gout? No.

10. A. Have you ever suffered from any disease not mentioned above?

A. Nothing except grippe, and acute dysentary.

B. Have you ever had any accident? B. No.

11. A. Have you been under the care of or consulted a physician concerning yourself for any cause within five years? A. Once three years ago.

B. If so, for what ailment; name and address of physician?

B. A pain in the back. N. Molitor, La Grande.



## 12. Family record.

	Age if living.	Condition of health, if not good, give full details.	Age at death	Cause of death	How long ill
Father .....	84	good			
Mother .....	69	good			
	(47, 40, 44,				
Brothers 7.....	35, 36, 31, 24	good			
Sisters 3.....	45	good			
	42	good			
			6 mo. Details	Cholera Infantum Previous Health	

NOTE.—In case death was not due to acute disease give details of last illness, and, in case of parents, the year of death.

Ages attained by Grandparents.	Father's Father 92	Father's Mother old	Mother's Father Old	Mother's Mother Old
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A. Is any person in your immediate household now or within two years been ill with consumption?

A. No.

B. Or has any one of them recently died of that disease? B. No.

I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that to the best of my knowledge and belief I am a proper subject for life insurance.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or in-

formation which he thereby acquired.

Witnessed by H. L. Underwood, M. D., Medical Examiner.

Signature of the person applying for insurance,  
George S. Moats.

George Scott Moats.

#### MEDICAL EXAMINER'S REPORT.

(To be filled out by the Medical Examiner only.)

13. Rate of the pulse (while seated) 72.

Its character? Normal.

14. Age? 33 years. Does age as given seem correct? Yes.

15. Exact height, 5 feet 9½ in. Exact weight, 187½ lbs.

Girth of chest at fourth rib, 39 in. Girth of abdomen at umbilicus, 36 in.

16. How well do you know applicant? Not previously.

17. Complexion, florid; color of hair, brown; eyes, brown.

18. Is applicant's general appearance healthy? Yes.

19. Is applicant deformed, no; lame or maimed? No.

20. Is applicant a Caucasian? Yes.

(If not, what is applicant's race?)

21. Has applicant recently gained weight? No.

(If so, how much and to what is it due?)

22. Has applicant recently lost weight? No., possibly a few pounds.

(If so, how much and to what is it due?)

23. Is applicant's build a family characteristic or an individual characteristic? Family characteristic.

24. Are there any marks of small-pox or of successful Vaccination? Yes.

25. Do you find, after careful inquiry and physical examination, any evidence of past or present disease? (If so, give full details.)

A. Of Brain or Nervous System? A. No.

B. Of the Heart or Lungs? B. No.

C. Of the Stomach or any of the Abdominal Organs? C. No.

D. Of Rheumatism or Gout? D. No.

E. Of the Skin, Middle Ear, Eyes, or any part of the body? E. No.

26. A. Does chemical examination of the applicant's urine show albumen or sugar (even in traces) or any abnormality? A. No.

B. State specific gravity, and if it is below 1015 or above 1025, give your opinion below as to the cause? B. 1024.

C. Has applicant ever had any genito-urinary ailment? (Syphilis-Stricture, &c.) (If so, give full details). C. No.

27. (Has no reference to application of men).

28. A. Have you ever seen the applicant under the influence of alcohol or drugs? A. No.

B. Do you know or suspect, that the applicant is now, or ever has been, intemperate? B. No.

29. Considering the amount of insurance which

applicant already carries, is the amount applied for in accordance with applicant's apparent means and surroundings? Yes.

30. Is there anything about the applicant's character, residence, mode of life or occupation which would render the risk in any way undesirable? No.

31. Have you reviewed all answers in this Report; and are you sure they are clear and complete? Yes.

(Any erasures or alterations should be initiated by the Examiner.)

32. Do you believe that the applicant has given full and true information in all respects? Yes.

I certify that I have carefully examined Geo. Moats, of Summerville, Oregon, in private at La Grande, Ore. this 16th day of March, 1911, for an insurance of \$10,000 on the applicant's life; that the applicant's "Answers made to the Medical Examiner" on the other side of this sheet are in my handwriting and are exactly as made by the applicant to me, and that the applicant signed them in my presence.

H. L. Underwood, M. D. La Grande. P. O. Address.

The Examiner is requested to send direct to the Company in New York City any information which, for any reason, he prefers not to embody in this report.. He can also mail this report direct to the Company if he prefers.

**SPECIAL NOTICE TO MEDICAL EXAMINER.**—The attention of the Medical Examiner is called to the fact that policies issued by this Company are

free from all restrictions as to residence, travel or occupation, and are incontestable after one year. Every endeavor should be made, therefore, to make this report as complete and precise as possible; the object being to give the Home Office a pen picture of the applicant as he presents himself to you. If in addition, therefore, you know of any fact, or have any impression not expressed above, that in your judgment would probably influence the Home Office in its estimate of the risk, please note it below.

Additional Remarks.

Cross Examination.

(Questions by Mr. COCHRAN):

Q. Who was present, Doctor, when you made that paper, "Defendant's Exhibit A"?

A. That is, when I made the examination?

Q. Yes.

A. Just the patient and myself.

Q. There in your office?

A. In my office, yes.

Q. And to the best of your knowledge, that was signed about one o'clock?

A. One—perhaps a little later. One, or one thirty. I have no clear recollection of the exact time, but it was afternoon.

Q. Did you examine the patient yourself?

A. I did.

Q. The applicant, I should say. Tell the jury what you found him to be from a physical view-point?



Mr. MONTGOMERY: If the court please, I object to that question upon the ground that it is not proper cross-examination, and upon the further ground that it is attempting to vary the terms set forth in this written instrument, all of which have been provided for by the questions and answers.

COURT: I suppose it is a part of the transaction that occurred at that time. The man who made an examination and who filled out this application that you have offered in evidence; I think counsel is entitled to all that occurred at the time.

Mr. MONTGOMERY: Save an exception.

COURT: The exception is allowed.

A. What is the question. (Question read). I found nothing abnormal. I found him a good risk, as far as the examination revealed his condition.

Q. Just tell the jury in detail what you did for yourself in examining him, and by yourself?

A. In the physical examination, in the asking of questions, and in getting the family history; I made the usual examination of the heart and lungs and using the stethoscope.

Q. Just tell the jury in detail how you did that, and what the stethoscope is.

A. The stethoscope is an instrument by which the physician listens to the action of the heart and lungs.

Q. What condition did you find the heart and lungs to be?

A. Sound.

Q. Proceed.

A. I made also a urinalysis, which was normal, and unusual only in the respect that I had to make the sugar test twice, as the first test was unsatisfactory, due probably to a poor solution. I had a fresh solution made up for a second test, and found nothing abnormal.

Q. What other examination did you make as the medical examiner of the defendant corporation?

A. You mean further examination?

Q. Yes.

A. Palpitation of the abdominal organs, and a general physical examination. I don't know that I gather all that you wish.

Q. I desire you to tell the jury everything you did there. Of course, not knowing myself, I can't tell you. You examined the abdominal organs—you say you palpitated them?

A. By palpitation through the abdomen.

Q. Tell the jury how that is done, and the reason for it.

A. That is done by the hand of the physician to determine the condition of the internal organs by manual palpitation, as far as that can be done.

Q. What condition did you find them to be?

A. I found nothing wrong.

Q. What else did you do?

A. Counted the pulse.

Q. What was it—normal or otherwise?

A. It was normal.

Q. What is the normal pulse of the ordinary man

of that age?

A. Approximately 72—depending upon the condition.

Q. And his pulse was approximately 72, was it?

A. As I recall it. I would refer to the record for things of that kind.

Q. You may state to the jury whether or not you noticed anything about Moats in your talk and conversations with him there—anything out of the normal, rather?

A. No, I merely observed in his replies he was a trifle slow; apparently very deliberate; a trifle slower than one would ordinarily make replies, but nothing that attracted my special attention.

Q. He had no ailment there at the time?

A. None that I detected.

Q. And you were there looking to find whether or not there was anything, were you, as the representative of the defendant company?

A. I was.

#### Re-Direct Examination.

(Questions by Mr. PLATT):

Q. Who accompanied Mr. Moats to your office, if anybody?

A. Mr. Lewis—H. P. Lewis brought him to the office, but was not present during the examination.

Q. Did his wife come in?

A. No, I did not see her.

Witness excused.

DR. NICHOLAS MOLITOR, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. In what occupation are you at present engaged?

A. Physician and surgeon.

Q. Are you regularly licensed to practice in the State of Oregon?

A. I am.

Q. How long have you practiced, Doctor?

A. Since 1891.

Q. At what place?

A. La Grande, Oregon.

Q. Were you during the year 1911 acquainted with George Scott Moats of Summerville, Oregon?

A. Yes, sir.

Q. State to the court and jury how and when and where you became acquainted with Mr. Moats.

A. I don't know when I became acquainted with him; been acquainted with him for several years. Met him at Summerville, I think, the first time.

Q. Did Mr. Moats during the year 1911 consult you with reference to any physical ailments?

A. He was up in my office, accompanied by his wife, early in March.

Q. Can you give the approximate date?

A. They were at my office on March 3, 1911, and

also on March 14, 1911.

Q. Concerning what did Mr. Moats——

A. About those dates—those are about the time they were there.

Q. Concerning what ailment, if any, did Mr. Moats consult with you on March 3rd, 1911?

A. He and Mrs. Moats came to the office on March 3rd, Mrs. Moats came to consult me, and about that time I had a conversation also with Mr. Moats.

Q. State what that conversation was.

A. With regard to his health, and at that time I gave him some advice.

Q. What, Doctor, was the diagnosis you made of his ailment at that particular time?

A. The examination I made of him was a short examination; I was satisfied in my own mind that he was suffering from neurasthenia. If I remember correctly I advised him not to work as hard, make a change and take a rest.

COURT: Please speak louder.

A. At that time, in my opinion, he was suffering from neurasthenia, lack of nervous force, and I advised rest and change, and I think prescribed some remedy for restlessness—things of that kind, or told them what to do.

Q. What, if any, were the character of the complaints which he made to you regarding his physical ailments.

A. As near as I can remember he complained of restlessness and at times weakness.



COURT: At times what?

A. Weakness.

Q. Now, you say he consulted you again on or about the 14th day of March?

A. No, they were at my office the 14th day of March; I don't remember his consulting me particularly at that time, neither will I say that he did so March 3rd. The only reason I have said March 3rd was at that time I have a charge against Mr. Moats on my books, and I believe that charge was made for Mrs. Moats, and on March 14th—I remember the situation particularly—they came in the office, and we had a conversation regarding themselves, and as they left, they paid me my fee for the previous examination, and after leaving, on going into the reception room, my office girl said she had made collections that day, and among the collections was the two dollars from Mr. Moats. Well, it dawned on me that I had collected the fee twice, and I returned the fee to them—caught them at the foot of the stairs and returned the money to them, so it was only one consultation that I charged them for.

Q. At the time of the second conversation on March 14th, or approximately that date, did Mr. Moats make any statement to you with reference to his physical condition?

A. No, it was in just—just an ordinary conversation, not a complete examination or full consultation.

Q. What was the character of the conversation? Give it in detail.

A. I can't tell you—can't recall it.

Q. What was his physical condition at that particular time?

A. In my opinion the man at that time was suffering from neurasthenia; suffering from overwork of some kind. I told him so there March 3rd or March 4th, some time along about that time.

Q. Now state, Doctor, what has been the extent of your experience with reference to the study and practice of nervous diseases. Give the schools, if any, from which you have graduated, and the extent of your experience.

A. I am a graduate of Rush Medical College of Chicago, 1891. I have taken post-graduate work in Chicago and also in New York, at different times since graduating from Rush Medical; spent the winter of 1898-1899, I think, in New York; I believe in 1895 I was in Chicago for post-graduate work. As far as my knowledge of nervous diseases, it is only the knowledge that a general practitioner will have. Never made any special study of nervous disorders.

Q. Based on your study and your general experience, if a patient on the 3rd day of March, in any given year, was suffering from neurasthenia, and consulted a physician with reference to that ailment, and again consulted a physician for the same ailment on the 14th day of March of that same year, and again was suffering from and consulted a physician with reference to that ailment on the 16th day of March of the same year, and subsequently and on or about the

21st day of March of the given year went to a sanitarium for the purpose of getting relief from neurasthenia, and a week subsequent to that time—within approximately two weeks thereafter was confined in an insane asylum suffering with manic insanity, and approximately thirty or sixty days from that time died, as a result of manic insanity, what would be your opinion with reference to the fact of whether or not the neurasthenia from which the patient was suffering on the first given date was an incipient form of insanity?

Mr. COCHRAN: We object to that as incompetent, irrelevant, and immaterial and not based upon any evidence in the case.

COURT: I think the objection is well taken. It embodies a great many facts that haven't been developed in this case yet—there is no proof of much of the matter stated in that hypothetical question, and it couldn't be of any value until the facts are proven.

WITNESS: Your Honor, am I compelled to answer any question of that kind?

COURT: That will depend on the ruling of the Court.

WITNESS: Well, I am not qualified to answer as an expert.

Q. Did Mr. Moats, on the date of his first consultation with you complain with reference to sleeplessness?

A. I don't recall it particularly. He may have.

## Cross Examination.

(Questions by Mr. COCHRAN):

Doctor, as I understand you, the particular occasion under which you spoke with Mr. Moats was on account of his wife calling to consult you about something?

A. As near as I can recall.

COURT: About herself or about him?

A. I believe in regard to Mrs. Moats.

Q. About herself?

A. Yes.

Q. And while consulting with you, isn't it this way—if I may submit a leading question: That after you had advised Mrs. Moats, Mr. Moats said that he was not sleeping well?

A. Yes, sir, some conversation there at that time—that same day or the day following; the incident had slipped my mind entirely until the inspector from the New York Life Insurance Company called at my office and said to me that—began questioning me in regard to Mr. Moats, whether I knew him, knew anything about him. I told him I had, and he informed me that in his application for insurance he had referred to me as one of the physicians—the physician that had attended him within the last four or five years.

Q. Now then, the real consultation that day took place for Mrs. Moats?

A. I believe that was the consultation that was paid for.

Q. The other was only incidental?

A. The other was only incidental, I believe that is a fact.

Q. And was not for a serious disorder, or anything like that, was it?

A. No, I didn't go into the case with him.

Q. And Mr. Moats was working very hard down there and you advised him to take a rest?

A. Yes, sir.

Q. Now then, from that view point, looking at it from that time, from the condition that Mr. Moats was in, could you tell that the man was going to die within ninety days?

A. I gave no thorough examination—couldn't give an opinion on that whatever—wouldn't attempt to.

Mr. MONTGOMERY: Do I understand your Honor's ruling is that before a hypothetical question can be asked, the facts must be developed?

COURT: Yes, that is my understanding of the law. There will have to be some evidence at least to sustain it; otherwise it wouldn't be of any value.

Mr. MONTGOMERY: We will ask leave to recall the Doctor in the morning.

Mr. COCHRAN: If the Court will pardon me, I would like to ask another question.

Q. Doctor, neurasthenia is one of those kinds of diseases in which you find no lesions or inflammation in the patient at all, do you?

A. Shall I answer that question?

COURT: Yes.

WITNESS: Of course that is expert testimony,



is it not?

COURT: I don't know; I am not a physician. You are competent to give an opinion.

WITNESS: Well, I would consider it expert testimony.

COURT: Are you competent to give an opinion?

A. I will give my opinion of the facts of the case as I know them. That is a question that requires knowledge that one derives not from personal association with that individual, as he came to my office, and it is knowledge to be imparted to the jury where they will take my experience that I have had, and in that way I would consider it expert testimony.

COURT: He is asking your opinion.

A. He is asking my opinion.

Q. I want the jury to understand something about neurasthenia.

A. It means nerve exhaustion.

Q. What is the condition of the patient? You don't find them suffering from any pain, do you?

A. Well, it is classified, Mr. Cochran, in this manner—as I understand—it has been my experience, there is cases of neurasthenia without any discovered lesions, physical lesions. You cannot account for it. In a great many cases, that is in some cases. In other cases the neurasthenia symptoms are always referable to some organic disease.

Q. Now, confining to Mr. Moats, there was no reference to organic disease at all?

A. I made no thorough examination and could not

pass an opinion on it—would not attempt to.

Q. Did he complain of suffering any pain at all?

A. I don't know; just restless and felt bad, and he was not my—I know I gave very little attention to it because I never considered him a patient of mine, or his family as being patients of mine. I knew when he consulted me it was only when the family physician was not at home, was the way I felt,—gave them temporary relief.

Q. The real consultation was for Mrs. Moats?

A. As I recall.

Re-Direct Examination.

Q. Now, you have said, Doctor, that neurasthenia is always caused by organic trouble. What do you mean by that?

COURT: Was it always caused? I didn't understand him to say always.

A. In a great many cases—from two causes. Some cases you cannot attribute to any discoverable organic lesions. Other cases patients have presented themselves with neurasthenic symptoms, and you always try to trace it to some organic lesions, to arrive at a correct basis upon which to establish your treatment. It is not merely treating the evidences which present themselves—insomnia, restlessness, nervousness,—but to get back of that, to that element which is producing those causes—producing those symptoms; and a majority of the cases can always be traced to some definite lesion of the system, either brain or some organ—some other organ.

Q. Are there no other causes of neurasthenia than

organic diseases?

A. No other causes?

Q. Yes.

A. Well, the causes given for neurasthenia—the causes given for it are overwork, worry, great excitement, which in turn produce some effect upon the system.

Q. On the system?

A. These causes will in time produce some lesion either upon the heart, kidneys, or brain, or nervous system. That is my understanding.

Q. Doesn't it produce effect first upon the nervous system?

Mr. COCHRAN: I object to that as leading.

A. That is a part of it, is it not? That is a part of the nervous system.

Witness excused.

Adjourned until 10 a. m. May 28.

Pendleton, Oregon, Tuesday, May 28, 1912, 10 a. m.

HENRY P. LEWIS, a witness called on behalf of the defendant, being first duly sworn, testified as follows.

#### Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. Where do you reside?

A. La Grande.

Q. In what line of business are you at present engaged?

A. Life insurance.

Q. In what capacity?

A. As Agent.

Q. For what company?

A. New York Life Insurance Company.

Q. Were you during the month of March, 1911, agent for the New York Life Insurance Company at La Grande?

A. I was.

Q. I now direct your attention, Mr. Lewis, to Defendant's Exhibit A, and ask you if that is your signature?

A. It is.

Q. Was the name, "George Scott Moats" signed to this application in your presence?

A. It was.

Mr. MONTGOMERY: I desire the record to show, if the Court please, that the offer of this application, which was made yesterday, was made in each of the cases. I neglected to state that.

COURT: That will be taken for granted. All the evidence offered is applicable to each case.

Q. Mr. Lewis, about what time of the day was this application, Defendant's Exhibit A, signed by Mr. Moats?

A. It was some time in the afternoon.

Q. How long, Mr. Lewis, have you been identified with the New York Life Insurance Company as agent?

A. I think since 1890.

Q. Are you generally familiar with the character and operation of other life insurance companies?

A. Well, to some extent, yes.

Q. Well, to what extent?

A. Well, as coming in competition with them and studying them up.

Q. State whether or not the New York Life Insurance Company is a mutual company?

Mr. COCHRAN: We object to that as incompetent, immaterial and irrelevant.

Mr. MONTGOMERY: This is offered, if the Court please, in support of Paragraph 1 of Defendant's Further Separate Answer and Defense, which alleges the incorporation and organization and the general character of the New York Life Insurance Company, and we ask that it be received.

COURT: That is denied, is it, by the reply?

Mr. COCHRAN: No, sir.

COURT: The reply denies everything in the answer, if I remember.

Mr. COCHRAN: I think we expressly admit the incorporation. Otherwise they could not prove the incorporation by testimony here.

COURT: He is not asking about the incorporation. He is asking about the purpose. You allege incorporation in your complaint.

Mr. COCHRAN: May it please the court, I think we are proceeding in error there.

Mr. MONTGOMERY: Your statement is correct, Mr. Cochran, I notice you admit Paragraph 1 of the answer.

COURT: That is admitted. Then there is no ne-



cessity for any proof on the subject.

Mr. PLATT: We want to show it is mutual, and not a stock company, in its operation.

COURT: You have alleged that, haven't you?

Mr. PLATT: Not in direct terms, no.

COURT: What is the allegation in the answer?

Mr. MONTGOMERY: (reading) "That, during all the times herein mentioned, the defendant was, and still is, a corporation incorporated, organized, and existing under and by virtue of the laws of the State of New York, with its principal office and place of business in the City of New York and State of New York, and has complied with all the requirements of the laws of the State of Oregon governing and regulating foreign insurance companies operating within the State of Oregon, and was, during all the times herein mentioned, and still is, authorized and licensed to transact a general life insurance business within the State of Oregon." Then, if the Court please, it appears from the face of Plaintiff's Exhibit 1 that the "proportion of the visible surplus accruing on this policy shall be ascertained and distributed annually, and not otherwise, and at the option of the insured shall each year, on the anniversary of the policy, be either—" and then is set forth the various methods of distribution, and I want to have the Court clear on the reason for this distribution. It was not a stock company.

COURT: Well, he may answer the question, if he knows.

Mr. COCHRAN: Save an exception.

COURT: Exception is allowed.

A. The question please. (Question read). It is.

Cross Examination.

(Questions by Mr. COCHRAN):

Q. How long has the New York Life Insurance Company been in the habit of distributing its earnings?

A. Since—well, I should say the last policy—since 1907.

Q. Since Mr. Hughes got after them—

Mr. PLATT: Objected to as incompetent and immaterial, and injected in this case for the purpose of creating a prejudice.

COURT: Limit your cross examination to the question whether it is a mutual company, and when it became such, and not the reason.

Q. Since 1906, do I understand you to say?

A. Those last annual dividend policies were issued?

Q. Yes.

A. Since 1907, I think.

Q. Previous to that time it had accumulated and held at its home office about how much money?

Mr. PLATT: Objected to as immaterial, incompetent, irrelevant and not proper cross examination.

COURT: I think it is proper cross examination. If it is pertinent at all to show it is a mutual company, counsel have a right to know all about it, the manner in which it conducts its mutual business.

Mr. PLATT: This question does not affect its mutually. Simply a question of the method of distribution.

COURT: I suppose it goes to the question of whether it was a mutual company, in fact.

Mr. PLATT: Save an exception.

COURT: The exception is allowed.

A. Please give the question. (Question read). I couldn't give just the amount of money which was accumulated for these policy holders at that time without referring to the statistics.

Q. Such statistics have been furnished you from time to time by the company, have they not?

A. Yes.

Q. Just tell the jury in a general way?

A. Well, as regards to the amount?

Q. Yes.

A. Well, I think something like \$400,000,000 was accumulated by the reserve.

Q. Something like \$400,000,000?

A. Yes, sir.

#### Re-Direct Examination.

(Questions by Mr. PLATT):

Q. The policies under the old plan had deferred dividends instead of annual dividends, that is all?

A. If I have a right to explain there, I would say this: That before the deferred dividends we wrote annual dividend policies.

Witness excused.

Mr. MONTGOMERY: I desire now to offer in evidence in each case, the depositions of John C. McCall, Norman R. Haskell and Albert J. Pickford, taken under the provisions of Sections 863, 864 and 865, of the Revised Statutes allowing the taking of open depositions, and request that these be received in evidence at this time as an entirety, and that I be permitted to refer to one or two particular questions, which I desire now to read, reading the deposition as an entirety at a later time.

Mr. COCHRAN: We have no objection to the order in which the documents may be read to the jury.

Depositions in question marked "Defendant's Exhibit B."

Mr. COCHRAN: It is understood, I presume, the portion that goes in the record are the interrogatories and the answers?

Mr. MONTGOMERY: And the exhibits accompanying them.

Mr. COCHRAN: Oh, I refer to the certificates of the officers and stipulations under which taken.

Mr. MONTGOMERY: Are a part of the depositions.

Mr. COCHRAN: Quite true, but no reason why the record should have them.

Thereupon the following deposition—Defendant's Exhibit B, was received in evidence:

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate

of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

### NOTICE.

TO IDA M. MOATS, GUARDIAN OF THE PERSON AND ESTATE OF GEORGE A. MOATS, A MINOR, PLAINTIFF ABOVE NAMED, AND COCHRAN & COCHRAN, HER ATTORNEYS OF RECORD:

Please take notice that the defendant herein will take the testimony of John C. McCall, Norman R. Haskell and Albert J. Pickford, all of whom reside at the City of New York, State of New York, and others, each and all of whom reside more than one hundred miles from the place of trial herein and more than one hundred miles from any place at which a District Court of the United States for the District of Oregon, is appointed to be held by law, at the final hearing for use on behalf of the defendant before Louis H. Cooke, a notary public in and for the County of New York, State of New York, who is not of counsel or interested in this cause, at his office No. 346 Broadway, in the City of New York, and State of New York, on the 29th day of April, 1912, at 11 o'clock a. m., and thereafter from day to day as the taking of the depositions may be adjourned; and such testimony will be so taken in accordance with the pro-



visions of sections 863, 864 and 865 of the revised statutes of the United States.

PLATT & PLATT and HUGH MONTGOMERY,  
Attorneys for Defendant,  
901 Board of Trade Bldg.

Dated at Portland, Oregon this 12th day of April,  
1912.

Copy Defendant's Ex. B.

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

DEPOSITIONS ON BEHALF OF THE DE-  
FENDANT.

Depositions of sundry witnesses taken pursuant to the annexed notice before me, Louis H. Cooke, at my office, No. 346 Broadway, in the City of New York, in the State of New York, on the 29th day of April, 1912, at eleven o'clock A. M., to be read in evidence on behalf of the defendant in the trial of the above entitled cause.

JOHN C. McCALL, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, de-

poseth and saith as follows:

First Interrogatory:

Please state your name, place of residence and occupation?

Answer to First Interrogatory:

My name is John C. McCall; I reside at No. 258 West 78th Street, in the City of New York, in the State of New York, and I am Second Vice-President of the defendant New York Life Insurance Company.

Second Interrogatory:

How long have you been Second Vice-President of the New York Life Insurance Company?

Answer to Second Interrogatory:

Since the second Wednesday in October, 1909.

Third Interrogatory:

Before you became Second Vice-President what office, if any, did you hold?

Answer to Third Interrogatory:

I was Secretary.

Fourth Interrogatory:

How long had you been Secretary?

Answer to Fourth Interrogatory:

Ever since May 13th, 1903, until the time of my election as Vice-President.

Fifth Interrogatory:

What are, and ever since you became Second Vice-President of the defendant have been your duties and authority?

**Answer to Fifth Interrogatory:**

During all of said time it has been my duty to conduct the general correspondence of the defendant, and to have general direction and charge of the opening and distribution of the defendant's mail, to have access to and official custody of its records, and to generally supervise the following divisions of the defendant in its Home Office in New York, that is, the defendant's Division of Policy Issues, the Division of Policy Records, the Division of Policy Briefs, the Division of Policy Changes, the Division of Policy Loans, the Division of Policy Loans and Securities, the Division of Policy Claims, and the Division of Files and Records.

**Sixth Interrogatory:**

Have you in your possession and under your control as Second Vice-President of the defendant its records in the matter of policies numbered 4,258,252 and 4,258,253, for \$5,000 each, on the life of George Scott Moats? If so, please state, if you know, where the original application of said Moats for said policies is?

**Answer to Sixth Interrogatory:**

I have. The original application for said policies I have identified as McCall's Exhibit A, and attached to my deposition in the case in this Court of Ida M. Moats against New York Life Insurance Company, and filed it as a part

of my said deposition.

**Seventh Interrogatory:**

Will you produce a full, true and correct photographic copy of said original application of George Scott Moats, identify it as an exhibit, attach it to, make it a part of and return it with your deposition, stating in your answer for further identification how you have identified said document?

**Answer to Seventh Interrogatory:**

I will and have done so. Said copy of said application for policies numbered 4,258,252 and 4,258,253 I have identified as McCall's Exhibit A, attached it to, made it a part of and return it with my deposition.

**Eighth Interrogatory:**

How many leaves are there of McCall's Exhibit A?

**Answer to Eighth Interrogatory:**

There are two.

**Ninth Interrogatory:**

Briefly describe each leaf so that there may be no mistake about the papers you refer to.

**Answer to Ninth Interrogatory:**

One leaf identified as McCall's Exhibit A is entitled at its top "Application to the New York Life Insurance Company," and the other leaf, also identified as McCall's Exhibit A is entitled at the top of the page "Answers Made to the Medical Examiner in continuation of and form-

ing a part of my application for insurance in the New York Life Insurance Company, dated March 16, 1911," and both leaves are dated March 16, 1911, one being signed "George Scott Moats", and the other "George S. Moats, George Scott Moats."

**Tenth Interrogatory:**

You may state, if you know, when the defendant received the original papers of which McCall's Exhibit A is a photographic copy?

**Answer to Tenth Interrogatory:**

I do, not know the exact date when the defendant's soliciting agent received said original of McCall's Exhibit A, but the defendant's record shows that said original was first received at the Company's Office in Portland, Oregon, for transmission to the Home Office on the 18th day of March, 1911, and that it was received at the Home Office on the 23rd of March, 1911.

**Eleventh Interrogatory:**

You may state whether or not the defendant has a course of procedure through which the original of which McCall's Exhibit A is a copy, and all other like papers pass in the defendant's business for the purpose of its action thereon, and whether or not in such course of procedure a record of the action taken is made at the time.

**Answer to Eleventh Interrogatory:**



The defendant has such course of procedure and a record thereof is duly made at the time.

**Twelfth Interrogatory:**

You may state what that course of procedure is, and how and when the record is made.

**Answer to Twelfth Interrogatory:**

When a soliciting agent such as H. P. Lewis was, who took Mr. Moats' application, receives an application such as is shown by one page of McCall's Exhibit A, it is the duty of the soliciting agent to see that the applicant is examined by one of the Company's Medical Examiners in the locality where the applicant resides, and in doing so the soliciting agent must leave the signed application with the Examiner for his use in preparing the Medical Examiner's Report. After the Medical Examiner examined the applicant and prepares his report thereon the Medical Examiner then sends the application, consisting of a paper such as both pages of McCall's Exhibit A, and in addition thereto the Medical Examiner's Report, which is on the reverse side of the second page of McCall's Exhibit A, either to the local office through which the soliciting agent reports his business to the Home Office, or directly to the Home Office, but usually, and almost without exception, the Medical Examiner sends the application and his report to the local office. It is the duty of the local office on receipt of the

application and the Medical Examiner's Report to make up and attach to the papers so received by that office a form known as the Home Office memorandum, being known as form 2065, by writing in the proper place in said form the name of the applicant, the date of birth, as shown by his application, his Post-Office address, the name of the beneficiary, and the date when the application was received at the local office, and the date when the local office sent out blanks for an inspection of the risk. It is the duty of the Local office after filling out the Home Office memorandum sheet, as stated, to fasten all the papers together with the Home Office memorandum on top, enclose them in an envelope, and mail them to the Home Office.

When these papers are received at the Home Office they pass through various Departments and authorities where, and whose duty it is to take any action thereon, and whatever action is taken is recorded at the time on the Home Office memorandum form, which the local office has transmitted with the papers.

#### Thirteenth Interrogatory:

You may state whether or not the original papers of which McCall's Exhibit A is a photographic copy was handled by the defendant in its action thereon according to its regular and established course of procedure and a record

thereof was made at the time.

Answer to Thirteenth Interrogatory:

Yes, they were, and a record of the defendant's action thereon was made at the time.

Fourteenth Interrogatory:

Have you in your custody and under your control as Second Vice-President a full, true and correct copy of the record which you have referred to as the Home Office memorandum, form 2065, relating to the policy in question, and where is the original thereof, if you know?

Answer to Fourteenth Interrogatory:

I have such copy. The original thereof I have identified as McCall's Exhibit B and filed with my deposition in the case of Ida M. Moats against the New York Life.

Fifteenth Interrogatory:

Will you produce said copy of said Home Office memorandum form 2065, identify it as an exhibit, attach it to, make it a part of and return it with your deposition, in your answer stating how you have identified it?

Answer to Fifteenth Interrogatory:

I will and have done so. Said copy of the Home Office memorandum form 2065, the original of which contains the defendant's original record of its action on McCall's Exhibit A I have identified as McCall's Exhibit B, attached it to, made it a part of, and return it with my deposition.

**Sixteenth Interrogatory:**

You may state, if you know, whether or not the original document of which McCall's Exhibit B is a copy is the defendant's original record containing a full, true and correct history of the defendant's action on the application of George Scott Moats?

**Answer to Sixteenth Interrogatory:**

It is.

**Seventeenth Interrogatory:**

Is it or not the defendant's only original record of the defendant's proceedings and action on the papers of which McCall's Exhibit A is a copy?

**Answer to Seventeenth Interrogatory:**

It is.

**Eighteenth Interrogatory:**

You may state, if you know, whether or not the entries thereon were made by the defendant in the regular course of business and at the time of the several transactions therein recorded?

**Answer to Eighteenth Interrogatory:**

They were.

**Nineteenth Interrogatory:**

Is it or not a record such as the defendant makes in all cases of applications for insurance?

**Answer to Nineteenth Interrogatory:**

It is. It is a regular record made according to the Company's customary rules and practice in

all cases of applications for insurance.

**Twentieth Interrogatory:**

Are you familiar with, and can you state the meaning and import of each and all the entries on McCall's Exhibit B?

**Answer to Twentieth Interrogatory:**

I am and can do so.

**Thenty-first Interrogatory:**

Will you kindly take the exhibit and explain to the Court all the entries thereon in so far as the meaning of such entries is not obvious, stating **the times when**, the persons by whom, and **the meaning of each** such entry?

**Answer to Twenty-first Interrogatory:**

I will. They are as follows: **The main part** of the exhibit above the horizontal, **heavy, black** line, extending entirely across the page, is the part of the form which the **Oregon Office**, which is located in **Portland**, filled out after the original of which **McCall's Exhibit A** are copies were received at that office, **except** such parts of the exhibit above said black line as I shall hereafter explain. All that part above said black line which is in typewriting was made by the defendant's **Portland, Oregon Office**, pursuant to the rules of the **Company**, as soon as that office received the original of **McCall's Exhibit A**, and were made up from data contained in said original. When the original of **McCall's Exhibit B** was first received at the



Home Office it had attached to it the original papers of which McCall's Exhibit A are copies. Said papers were first received in the defendant's Mail Room and from there were transmitted to the defendant's Division of Indexes. On their receipt there the Index Division stamped on the Home Office memorandum the date of its receipt in the Index Division, "Mar 23 1911 RECEIVED-INVOICED," and then after the Index Division searched the records for the purpose of ascertaining whether or not the applicant had other policies in the Company, and that Division ascertained from such search that the applicant was not insured under any other policies, the Index Division stamped on the second line opposite the date March 23, 1911, the words "NO RECORD-INS." which mean that the Company had no record of any other insurance on the life of this applicant. The blue, heavy block after the words "NO RECORD-INS." was made at the time that "NO RECORD-INS." was stamped upon the paper, and erases that part of the stamp which contains the word "STATEMENT," the entire stamp being "NO RECORD-INS. STATEMENT." If there had been other insurance on the life of the applicant the blue block would not have been made there, but it would have been the duty of the Index Division to state on the reverse side of the Home Office memoran-

dum sheet all the other insurance statement of insurance in the Company on the life of the applicant. The block on the upper line opposite the words "RECEIVED-INVOCED" is a block made on the 23rd of March in the Index Division, erasing that part of the entire stamp of the Index Division which contains the letters "M. I. B." which stand for Medical Information Bureau, and shows that the Index Division examined the records of the Medical Information Bureau and found no record of any adverse insurance report by any Company on this applicant. The Index Division also at the time of receiving the exhibit with the papers attached in that Division, stamped the date and the hour of receiving it in that Division up in the upper right-hand part of it, the words being "Mar 23" with a dial containing an arrow, which points to the figure "2," which means that the papers were received in the Index Division at two o'clock on the 23rd of March. The stamp just below the horizontal, black line on the line with the date "Mar 23 1911" shows the hour at which the Index Division completed its investigation and record, so far as it was the duty of that Division to act upon the papers. The stamp referred to shows the date March 23 and dial with an arrow in the center pointing midway between the figures "2" and "3," which means that the Index

Division finished its work on the exhibit at half after two o'clock on the 23rd day of March, and the word and figures "Index 16" show that an employee known as No. 16 in the Index Division put the stamp I am now testifying about on the Home Office memorandum and forwarded all the papers to the next Division where they should go, namely, to the Medical Department. The entry "24 1911 ADVISED at per cent M 70 CLH" is the entry made by the defendant's Medical Department and is the entry of the fact that the papers were received in the defendant's Medical Department on the 24th of March, 1911, and that the Medical Director, Calvin L. Harrison, one of the defendant's Medical Directors, examined the application and the report of the Medical Examiner, which were attached to McCall's Exhibit B and rated the risk at 70. This rating at 70 means that the papers showed the applicant to be a first-class risk and acceptable for insurance as applied for, the Company's practice being to rate all risks on a basis of 100 per cent. If the papers attached to McCall's Exhibit B had shown the applicant to be an impaired risk, the rating in place of being 70 would have been more than 100. Below the entry of March 24, which I have just been testifying about, are the words "FORWARD POL NO..... AS ADVISED" with a blue lead pencil line

run through it. This shows that after Dr. Harrison had examined the papers and found the risk acceptable he sent the papers to the Division of Policy Issues for that Division to write up the policy as applied for and transmit it. This stamp "FORWARD POL. NO..... AS ADVISED" was put on the original Home Office memorandum in the defendant's Division of Policy Issues at the time the papers reached that Division, but the papers came in the Division of Policy Issues into the hands of an employee there named A. Bergholz. Mr. Bergholz made the entry of March 24, 1911 immediately under the stamp "FORWARDED," and so forth, which has the blue pencil line through it. Mr. Bergholz's entry shows that when he received the papers there he found that the amount applied for was \$10,000. Under the Company's rules an amount of insurance of \$5,000, or over is not issued without the papers first going into the hands of what we know as our Classification Committee. Therefore, Mr. Bergholz on the 24th of March made on the original Home Office memorandum the entry as follows—"MAR 24, 1911 Referred to Class. Com. o|a amt (Rule) A. Bergholz." This entry is intended to, and does read as follows, "March 24, 1911 Referred to Classification Committee on account of amount (Rule)," that is, because the Com-

pany's rule requires insurance for an amount such as here is applied for to be referred to the Classification Committee. Under Mr. Bergholz's entry, the entry "MAR 24 1911 Amt O K W S" when extended reads as follows,— "March 24, 1911 Amount all right William Stoddard." That means that William Stoddard, who is a member of the Classification Committee, had received the papers and that the amount applied for was satisfactory for this risk. Under Mr. Stoddard's entry the entry "MAR 25 1911 RECEIVED IN DIV. POL. ISSUES THIS DAY" shows that Mr. Stoddard sent the papers back to the Division of Policy Issues for the preparation of the policies. The entry "Mar. 27 1911 FORWARDED POL. NO. 4,258,252, 4,258,253 AS ADVISED subj. Amend. 3 & 8 M" is an entry made on the original memorandum on the 27th of March in the division of policy issues by an employee in the Division by the name of McCormick, and said entry when extended reads as follows,— "March 27, 1911 Forward Policies No. 4,258,252 and 4,258,253, as advised, subject to amendment relating to questions No. 3 and 7 in the application" and that the policies as forwarded were accompanied by the Company's form for amendment of the application in respect of said queries 3 and 8 by Mr. McCormick. The next entry "APR 7 1911



FILED BY NO. 42" means that on April 7, 1911, the papers were sent to the defendant's Division of Files and Records and were there filed by the employee in that Division known as No. 42. The next entry "APR 17 1911 FILED BY NO. 12" shows that the file had been taken from the File Room on the 17th of April for the purpose of attaching to the file the signed amendment which Mr. McCormick had transmitted with the original policy, and that after the amendment had been so attached the file had then been returned and filed by No. 12 in that Department. The next entry "DEAD" was put on the memorandum after the Company received a report at the Home Office that the applicant was dead. There are some figures and marks up to the upper right-hand corner which I should explain. After the letters "B. & F. H., which mean "build" and "family history," is put the figures "100-15"; "Resid" which stands for residence with a check-mark; "Occup'n"—15" which means "Occupation minus 15"; "Habits" followed by a check-mark; "Ph. Cond." followed by a check-mark, which stands for "physical condition"; "Pers'l H." which means "personal history" followed by a check-mark; "Race" followed by a check-mark, which taken together show the way the rating of 70 per cent is arrived at, namely, that the build and family history were one hundred

minus fifteen, which is better than normal; that the occupation was fifteen better than normal, thus leaving the net risk seventy, the other features of the risk being all normal. The numbers on the left hand upper corner after the words "Policy No." were put on the original by the defendant's Division of Policy Issues at the time the policies were written up, the space in that corner of the record being intended for that purpose.

**Twenty-second Interrogatory:**

You may state whether or not the defendant took the action on the original of McCall's Exhibit A that the original of McCall's Exhibit B shows, and as you have read the exhibit?

**Answer to Twenty-second Interrogatory:**

It did.

**Twenty-third Interrogatory:**

You may state, if you know, what was done with the policies when they were forwarded on March 27, 1911?

**Answer to Twenty-third Interrogatory:**

They were forwarded by the defendant's Division of Policy Issues to its office in Portland, Oregon, with authority to that office to give the policies into the hands of the agent who took the application, under instructions to him to deliver the policies, provided, and only provided, no change whatever had occurred in the health of the applicant since the date of his

medical examination, and under further instructions to him that if any change whatever had occurred in the health of the applicant since the date of his medical examination he must not deliver the policies but must at once return them to the Oregon Office.

Twenty-fourth Interrogatory:

Attached to McCall's Exhibit A and at the bottom of the exhibit is a written declaration of the applicant that he had paid the agent, H. P. Lewis, \$268.20. What, if you know, was the indication of this declaration?

Answer to Twenty-fourth Interrogatory:

Just as the declaration itself states; that at the time of the application the applicant paid \$268.20, which was the full amount of the first annual premium on the insurance applied for, and had given him the coupon receipt, form of which has been detached for that purpose from the bottom of the exhibit.

Twenty-fifth Interrogatory:

You may state whether or not this coupon receipt is the Company's regular form of receipt for money paid with an application?

Answer to Twenty-fifth Interrogatory:

It is.

Twenty-sixth Interrogatory:

Have you, or not, the form of the receipt that was detached from the original of McCall's Exhibit A?

Answer to Twenty-sixth Interrogatory:

I have.

Twenty-seventh Interrogatory:

Please produce it, identify it as an exhibit, attach it to, make it a part of, and return it with your deposition, stating in your answer how you have identified it.

Answer to Twenty-seventh Interrogatory:

I will and have done so. The form of the receipt which has been detached from the original, of which McCall's Exhibit A is a copy, I have identified as McCall's Exhibit C, attached it to, made it a part of and return it with my deposition, the form attached not purporting to be filled out but simply the form. It should, of course, have been filled out to correspond with the declaration which I have referred to and a photographic copy of which forms a part of my Exhibit A. I have erased from the left end of my Exhibit C the letters which were printed on the form which was detached from by Exhibit A and replaced them by the letters and figures "O C 106948" for the receipt form contains the same number as the application form and no two application forms contain the same number in this place, the purpose of the identity of the number on the application and on the receipt form being to identify the two.

Twenty-eighth Interrogatory:

Have you ever seen the original of McCall's

Exhibit C?

Answer to Twenty-eighth Interrogatory:

No.

Twenty-ninth Interrogatory:

Has it ever been returned to the defendant?

Answer to Twenty-ninth Interrogatory:

No.

Thirtieth Interrogatory:

Have you in your possession or under your control the amendment which you have referred to, relating to questions No. 3 and 8 to said application, the original of McCall's Exhibit A? If not, where is it?

Answer to Thirtieth Interrogatory:

I have not. The original thereof I identified as McCall's Exhibit D and filed it as a part of my deposition in the case of Ida M. Moats against New York Life Insurance Company in this Court.

Thirty-first Interrogatory:

Will you kindly procure a full, true and correct photographic copy thereof, identify it as an exhibit, attach it to, make it a part of and return it with your deposition, stating in your answer how you have identified it?

Answer to Thirty-first Interrogatory:

I will and have done so. I have identified said photographic copy of said paper as McCall's Exhibit D, attached it to, made it a part of and return it with my deposition.



**Thirty-second Interrogatory:**

When, where and by whom, if you know, was the rectangular stamp which appears to the left of the center of McCall's Exhibit D placed on the original thereof, and what is the meaning and purport of the stamp?

**Answer to Thirty-second Interrogatory:**

Said stamp was placed on said original on the 14th of April, 1911, by the defendant's Division of Policy Issues and shows that the original of said exhibit was received in the defendant's Division of Policy Issues of the Home Office through the mails on the 14th day of April, 1911.

**Thirty-third Interrogatory:**

On what, if you know, did the defendant rely in acting upon Mr. Moats' said application for insurance?

**Answer to Thirty-third Interrogatory:**

Upon the declarations made by him to the defendant's Medical Examiner, as shown in the original, of which McCall's Exhibit A is a copy, supplemented by the Medical Examiner's Report, which is on the reverse side of the original, of which McCall's Exhibit A is a copy.

**Thirty-fourth Interrogatory:**

You may state, if you know, whether or not the defendant would have accepted said application of said Moats for insurance, if it had known that on the 16th day of March, 1911,

the applicant had consulted a physician?

Answer to Thirty-fourth Interrogatory:

It would not.

Thirty-fifth Interrogatory:

You may state, if you know, whether or not the defendant would have accepted said application if it had known that on the date thereof the applicant then was, and for some time prior thereto, had been suffering from nervousness and insomnia?

Answer to Thirty-fifth Interrogatory:

It certainly would not.

Thirty-sixth Interrogatory:

When and how did the plaintiff first learn that the person named as the insured in the policy in controversy in this suit was suffering from nervous trouble and insomnia when he made his application for this insurance?

Answer to Thirty-sixth Interrogatory:

On the 1st day of August, 1911, from the proof of death No. 2, received that day, which consisted of Physician's Statement made by Dr. James W. Loughlin.

Thirty-seventh Interrogatory:

Did the defendant receive proofs of death in this case?

Answer to Thirty-seventh Interrogatory:

Yes.

Thirty-eighth Interrogator:

When?

**Answer to Thirty-eighth Interrogatory:**

It received partial proofs July 17, 1911, that is, claimant's statement No. 1, signed by Mrs. Ida M. Moats, statement No. 1, signed by Ida M. Moats as guardian of George A. Moats, and physician's statement No. 2, signed by Dr. A. E. Tamiesie, and statement No. 3, signed by J. C. Henry, but these proofs were not satisfactory and the Company required an additional physician's statement No. 2, signed by Dr. James W. Loughlin, which it received August 1, 1911.

**Thirty-ninth Interrogatory:**

Will you produce full, true and correct photographic copies of the proofs of death you have referred to, identify them as an exhibit, attach them to, make them a part of, and return them with your deposition, in your answer stating how you have identified them, and where the originals thereof are, if you know?

**Answer to Thirty-ninth Interrogatory:**

I will and have done so. I have identified said photographic copies as McCall's Exhibit E, attached them to, made them a part of, and return them with my deposition. The originals of which my Exhibit E is a copy I have identified as McCall's Exhibit E and attached them to and filed them as a part of my deposition in the case of Ida M. Moats against New York Life Insurance Company in this Court.

**Fortieth Interrogatory:**

For further identification you may describe the

papers you have identified as McCall's Exhibit E.

**Answer to Fortieth Interrogatory:**

Claimant's statement No. 1, purporting to be signed by Mrs. Ida M. Moats; claimant's statement No. 1, purporting to be signed by Ida M. Moats, Guardian of George A. Moats; physician's statement No. 2, purporting to be signed by James W. Loughlin; physician's statement No. 2, purporting to be signed by A. E. Tamiesie; friend's statement No. 3, purporting to be signed by J. C. Henry, and certified copy of the order appointing Ida M. Moats guardian of George A. Moats.

**Forty-first Interrogatory:**

When, if you know, was the stamp that appears on claimant's statement No. 1, near the middle of the statement, placed there on the original, where, and by whom?

**Answer to Forty-first Interrogatory:**

That stamp referred to was placed on the original in the Defendant's Division of Policy Claims at the time the papers were first received there by the clerk in that Division whose duty it was to place said stamp thereon at the time the papers were first received there.

**Forty-second Interrogatory:**

When, if you know, was the stamp that appears on physician's statement No. 2, near the middle of the statement to the left side thereof, signed

J. W. Loughlin, placed there on the original, where, and by whom?

Answer to Forty-second Interrogatory:

Said stamp was placed on said original on the 1st of August, 1911, in the defendant's Division of Policy Claims at its Home Office by the Clerk in that Division whose duty it was to place said stamp thereon at the time the paper was first received.

Forty-third Interrogatory:

After the receipt of Dr. Loughlin's affidavit, a photographic copy of which forms a part of McCall's Exhibit E, what action, if any, did the defendant take with respect to investigating the facts in regard to the representations made by the decedent to the defendant, as shown by his application?

Answer to Forty-third Interrogatory:

It sent a man from its Home Office to Summer-ville and LaGrande, Oregon, to investigate the truth of the statements made by Mr. Moats to the defendant, as shown by the original exhibit, of which McCall's Exhibit A is a copy.

Forty-fourth Interrogatory:

Whom did you send from the Home Office for that purpose?

Answer to Forty-fourth Interrogatory:

A. J. Pickford.

Forty-fifth Interrogatory:

When, and how did Mr. Pickford report to you



about what he found the facts in that behalf to be?

Answer to Forty-fifth Interrogatory:

He reported under date of August 21, 1911, by telegraph, his telegram being received here by me either late on the 21st, or on the 22nd of August, 1911.

Forty-sixth Interrogatory:

Have you a full, true and correct copy of the telegram which you say you received from Mr. Pickford late on the 21st of August, or on the 22nd of August, 1911? If so, please produce it, identify it as an exhibit, attach it to, make it a part of, and return it with you deposition, and tell the Court where the original thereof is, if you know.

Answer to Forty-sixth Interrogatory:

I have. I have produced such copy, identified it as McCall's Exhibit F, attached it to, made it a part of and return it with my deposition. The original of which my Exhibit F. is a photographic copy I have made a part of my deposition in the case of Ida M. Moats against New York Life Insurance Company in this Court, and filed it therewith.

Forty-seventh Interrogatory:

Is there any part of McCall's Exhibit F that is not a part of the original message as received? If so, state what part is not a part of the original message as received.

Answer to Forty-seventh Interrogatory.

All that is printed and all that is in typewriting is a true copy of the original message as received. The manuscript parts of the exhibit were not part of the original message.

Forty-eighth Interrogatory:

In whose handwriting, if you know, are the manuscript figures and words on the original of McCall's Exhibit F, to-wit, the figures and words "8|22|11 Deny Liability J."

Answer to Forty-eighth Interrogatory:

In my handwriting.

Forty-ninth Interrogatory:

When and why did you put said writing on said original?

Answer to Forty-ninth Interrogatory:

On the 22nd day of September, 1911, for the purpose of instructing the defendant's Division of Policy Claims, which is under my supervision, to deny liability on the Moats policies.

Fiftieth Interrogatory:

You may state whether or not you are familiar with the practice of Insurance Companies generally in acting upon applications for insurance?

Answer to Fiftieth Interrogatory:

I am.

Fifty-first Interrogatory:

How did you gain that familiarity?

Answer to Fifty-first Interrogatory:

From the fact that I have all my business life

been actively engaged in the business of life insurance, having been in the employ of the defendant and actively engaged in such business since the year 1899, and given careful study not only to the practice of this Company but to the practice of Companies generally on the questions that come up in life insurance, particularly questions relating to the acceptance of applications.

**Fifty-second Interrogatory:**

From your knowledge of the general practice of life insurance companies, what would you say as to whether or not the application of any person would be accepted for insurance as applied for by Mr. Moats, as shown by McCall's Exhibit A, if it were disclosed to the company before acting upon the application that the applicant at the time of making application, and immediately prior thereto, was suffering from sleeplessness and nervousness and had consulted a physician for such disability?

**Answer to Fifty-second Interrogatory:**

No responsible company would accept an application under such circumstances.

**Fifty-third Interrogatory:**

Based upon your general knowledge and experience in the business of life insurance, state whether or not if it appeared to a Life Insurance Company at the time of acting upon an application for insurance that the applicant whose application was under consideration was at the time

of signing such application suffering from nervousness and sleeplessness, and that for a period of some time, say in the neighborhood of two months prior to the date of his application, he was suffering from sleeplessness and nervousness and was excitable, and had attended various religious meetings at which he made excessive demonstrations of religious enthusiasm, how would such facts affect the action of an Insurance Company in passing upon the application?

Answer to Fifty-third Interrogatory:

The Company would decline an application where such facts were disclosed. Under the rules that obtain in passing upon applications for insurance, no responsible Company would accept an application with knowledge of such facts.

Fifty-fourth Interrogatory:

State, if you know, whether or not the disabilities described in the last question are found by experience to affect mortality, and if so, how, and are they material to the risk?

Answer to Fifty-fourth Interrogatory:

They certainly do affect mortality. They very decidedly increase mortality and impair the risk, and are material to the risk.

(Signed) JOHN C. McCALL,

Subscribed in my presence and sworn to before me this 29th day of April, 1912.

[Seal.] (Signed) LOUIS H. COOKE,

Notary Public New York County, No. 108  
and my Commission Expires March 30, 1914.

[McCall's Exhibit A.]

4,258,252.

4,258,253.

APPLICATION TO THE NEW-YORK LIFE INSURANCE COMPANY.

---

1. A. Name of the person applying for insurance.

NOTE—WRITE THE NAME IN FULL.

George Scott Moats.

B Residence: State, Oregon; County, Union; Town, Near Summerville; Street, .....; No.,.....

C Place of business, Same Same; Name of firm, No firm.

D To what address shall notices of premium be sent? Summerville, Oregon.

---

2. A Present occupation, Farming:

B Other occupations if any.

C State your exact duties in full. Retiring.

D Are you married? Yes.

---

3. A Place of birth, Illinois.

B Race or Nationality, White.

C Born on 2 day December, 1877:

D Age nearest birthday, 33.

---

4. A Are you now insured in any Company or Society? (Answer "yes", or "No.")

No.



B If so state in what Companies or Societies and the amount insured in each.....

C Have you an application now pending in any Company or Society?

No.

D If so give name of Company or Society .....

---

5. A Has any Company or Society ever declined to issue a policy on your life?

No.

B If so, state name of Company or Society.....

---

6. A Has any Company or Society ever issued, or offered to issue, a policy on your life differing from the one then applied for?

No.

B If so, state name of Company or Society, and give particulars .....

---

7. A To whom shall the proceeds of the insurance applied for be payable in event of death?

NOTE—GIVE CHRISTIAN NAMES IN FULL.

Mrs. Ida May Moats, wife; George Albert Moats, son 12 years old.

B Present residence, Summerville, Oregon.

C Relationship to you.

---

8. Sum to be insured, \$10,000; \$5,000 to Mrs. Ida May Moats. \$5,000 to George Albert Moats, my son.

2 Pol's of \$5,000 each.

Premium payable annually.

With..... waiver of premiums in case of permanent total disability.

On what table?

NOTE—

Strike out the rates and plans, not desired.

Ordinary life.

Life..... Premiums.

Endowment, payable in ..... years.

---

I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime and that, unless otherwise agreed in writing the policy shall then relate back to and take effect as of the date of this application. 2. That any payment on account of the first premium before delivery of the policy to me shall be binding on the Company only in accordance with the Company's receipt therefor on the coupon receipt form duly filled out and detached from this application, which is the only authorized form of receipt for such duly filled out and detached from this application, has no authority to make, modify or discharge contracts, or to waive any of the Company's rights or requirements.

Dated at La Grande, Org., this 16th day of March, 1911.

Signature of the person applying for insurance.

(Write the name in full.)

George Scott Moats.

Witnessed by H. P. Lewis, Agent.

Other Agents, .....

910-486.

Names and Residences of three intimate friends.

F. L. Myers, Cashier La Grande, Org.

D. R. McKenzie, Summerville, Org.

J. M. Choate, Summerville, Org.

**[McCall's Exhibit A.]**

O C 106948

STATEMENT TO BE SIGNED BY APPLICANT  
UPON PAYMENT OF THE PREMIUM OR  
ANY PART THEREOF.

Dated at La Grande, Org., March 16th, 1911.

I HEREBY DECLARE that I have paid to H. P. Lewis, Two Hundred Sixty Eight 30|100 Dollars in cash, and that I hold his receipt for the same, made up, without alteration, on the receipt form detached from and corresponding in date and number with this Application. I assent to the terms of said receipt.

(Signature of Applicant)

GEORGE SCOTT MOATS.

THIS BLANK MUST ACCOMPANY EVERY  
APPLICATION FOR INSURANCE ON THE  
LIFE OF A WOMAN.

Name of Applicant.....

Age .....

Married?

Single?

Widow?

(Erase the two not applicable.)

Maiden Name .....

(If applicant is married or a widow, full maiden name must also be given.)

Residence .....

---

IF SINGLE.

1. Do you reside at home with your parents?

1.

2. If not, where and with whom?

2.

---

IF MARRIED.

3. A. Is your husband living?

3. A.

B. If so, is he in good health?

B.

C. Give his age and occupation.

C.

---

4. A. How much life insurance does he carry?

4. A.

B. In what companies?

B.

C. If he carries no insurance, why does he not insure?

C.

---

5. A. How many children have you? Give age of each.

5. A.

B. If childless, how long married?

B.

---

---

IN ALL CASES ANSWER THESE QUESTIONS.

---

6. State your occupation fully.

6.

---

7. What income do you derive therefrom?

7.

---

8. Have you any other source of income?

8.

---

9. If so, state amount.

9.

---

10. Who will pay the premiums on this insurance?

10.

---

I HEREBY AGREE that the above answers shall form a part of my application to the New-York Life Insurance Company dated at ..... on the ..... day of ..... 19..... and I hereby renew and confirm my agreement therein.

.....



Signature of the person applying for insurance.  
Witness.

.....  
Dated at ..... 19.....  
2400. May, 1909.

.....  
Cashiers will fill out this blank correctly and distinctly.

.....  
NAMES AND ADDRESSES OF EVERY AGENT  
TO WHOM THIS BUSINESS BELONGS?  
AND HIS SHARE IN THE AMOUNT  
OF THE POLICY.

.....  
NAME. ADDRESS SHARE

.....  
H. P. Lewis Oregon, Br. all

.....  
AGENT TO WHOM THE BUSINESS BELONGS  
BY CONTRACT.

.....  
Do

Do

.....  
[McCall's Exhibit A.]

NOTICE TO MEDICAL EXAMINER: Use only  
black ink.

This examination is to be photographed.

THIS EXAMINATION MUST BE MADE IN PRIVATE: NO AGENT OR THIRD PERSON BEING PRESENT.

To be filled out by the Medical Examiner only)

ANSWERS MADE TO THE MEDICAL EXAMINER, .....

In continuation of and forming a part of my Application for Insurance in the NEW-YORK LIFE INSURANCE CO., dated Mar. 16th, 1911.

---

1. A. What is your occupation? (Full details.)

A. Farmer.

B. How long have you been engaged in your present occupation?

B. 6-7 yrs.

C. What was your previous occupation?

C. Merchant.

D. Do you contemplate making any change, temporary or permanent, in your occupation? (If so, give full details.)

D. No.

---

2. Do you contemplate changing your residence, or making a journey, or is there any probability that you will do either? (If so give full details).

No.

---

3. In what States have you lived the last ten years, and which years in each. If outside the U. S.,

in what countries, and which years in each?)  
Oregon.

---

4. A. Have you now any connection, direct or indirect, with the manufacture or sale of wines, spirits or malt liquors?

A. No.

B. Have you ever had any such connection? (If so, in either case, give full details.)

B. No.

---

5. A. What is your daily consumption of wine, spirits or malt liquors?

A. None.

B. What has it been in the past?

B. Not for years. Occasionally a little beer.

C. Have you at any time used alcohol or drugs to excess?

C. No.

---

6. Have you ever raised or spat blood? (If so, give full details.)

No.

---

7. What is the name of the agent who induced you to make this present application?

Mr. H. P. Lewis.

---

8. A. Has any life insurance Company ever examined you, either on an application for insurance or for

any other reason, without issuing a policy? (If so, state name of Company).

A. No.

B. Has any Life Insurance Company ever issued or offered to issue a policy on your life different from the one applied for? (If so, state name of Company, and give particulars.)

B. No.

---

9. Have you ever had or suffered from any of the following diseases? Answer "Yes" or "No" to each part of this query below. (Give explicit answers and particulars in each case—the Examiner should satisfy himself that the applicant gives FULL and CAREFUL ANSWERS to this question.

"Yes" or "No"; Name of Disease; No. of Attacks; Date; Duration; Severity; Results.

---

A. Of the Brain or Nervous System?

No.

B. Of the Heart or Lungs?

No.

C. Of the Stomach, Liver, Kidneys or Bladder?

No.

D. Of the Skin, Middle Ear or Eyes?

No.

E. Rheumatism or Gout?

No.

---

10. A. Have you ever suffered from any disease

not mentioned above?

A. Nothing except grippe and acute dysentery.

B. Have you ever had any accident?

B. No.

11. A. Have you been under the care of or consulted a physician concerning yourself for any cause within five years?

A. Once 3 yrs. ago.

B. If so, for what ailment; name and address of physician?

B. A pain in the back. N. Molitor, La Grande.

		Age if Living.....	Condition of Health, if not good, give full details .....	Age at Death .....	Cause of Death.....	How Long Ill .....	Details .....	Previous Health .....
12. FAMILY RECORD.								
Father	.....	84	good					
Mother	.....	69	good					
	(	47	good					
	(	45	good					
	(	44	good					
Brothers 7	.....	35	good					
	(	36	good					
	(	31	good					
	(	24	good					
Sisters 3	.....	45	good					
	(	42	good					

Cholera  
6 Mo. Infantum

NOTE.—In case death was not due to acute disease, give details of last illness, and, in case of parents, the year of death.

Ages attained by Father's Father's Mother's Mother's  
Grandparents..... Father 92 Mother Old Father Old Mother Old

A. Is any person in your immediate household now or within two Years been ill with consumption?

A. No.



B. Or has any one of them recently died of that disease?

B. No.

---

I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that to the best of my knowledge and belief I am a proper subject for life insurance.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Signature of the person applying for insurance.

GEO. S. MOATS.

GEORGE SCOTT MOATS.

Witnessed by H. L. Underwood, M. D., Medical Examiner.

911-31

---

For filing

DO NOT WRITE

on this corner.

(To be filled out by the  
Medical Examiner only.)

MEDICAL EXAMINER'S REPORT.

---

13. Rate of the pulse (while seated) 72; Its character? Normal.

---

14. Age? 33 years. Does age as given seem correct? Yes.

---

15. Exact height, 5 feet 9½ in. Exact weight, 187½ lbs. Girth of chest at fourth rib, 39 in. Girth of abdomen at umbilicus, 36 in.

---

16. How well do you know applicant? Not previously.

17. Complexion, Florid; Color of Hair, Brown; Eyes, Brown.

---

18. Is applicant's general appearance healthy? Yes.

19. Is applicant deformed, No; lame or maimed? No.

20. Is applicant a Caucasian? Yes.  
(If not, what is applicant's race?)

---

21. Has applicant recently gained weight? (If so, how much and to what is it due?) No.

22. Has applicant recently lost weight? (If so, how much and to what is it due?)

No—possibly a few pounds.

---

23. Is applicant's build a family characteristic or an individual characteristic? Family Characteristic.

24. Are there any marks of smallpox or of successful vaccination? Yes.

---

4,258,252.

4,258,253.

25. Do you find after careful enquiry and physical examination, any evidence of past or present disease?

(If so, give full details.)

A. Of Brain or Nervous System?

A. No.

B. Of the Heart or Lungs?

B. No.

C. Of the Stomach or any of the Abdominal Organs?

C. No.

D. Of Rheumatism or Gout?

D. No.

E. Of the Skin, Middle Ear, Eyes, or any part of the body?

E. No.

---

26. A. Does chemical examination of the applicant's urine show albumen or sugar (even in traces) or any abnormality?

A. No.

B. State specific gravity, and if it is below 1015 or above 1025, give your opinion below as to the cause.

B. 1024.

C. Has applicant ever had any genito-urinary ailment? (Syphilis—Stricture, &c.) (If so, give full details.)

C. No.

---

IF A WOMAN.

27. D. Number of children had, if any?

D.

E. Ages of those living?

E.

F. Is she now pregnant?

F.

G. Have her pregnancies and labors been normal?

G.

H. Has she passed the climacteric?

H.

J. Has she ever had any disease peculiar to her sex?

J.

---

28. Have you ever seen the applicant under the influence of alcohol or drugs?

A. No.

B. Do you know or suspect, that the applicant is now, or ever has been, intemperate?

B. No.

---

29. Considering the amount of insurance which applicant already carries, is the amount applied for in accordance with the applicant's apparent means and surroundings?

Yes.

---

30. Is there anything about the applicant's character, residence, mode of life or occupation which would render the risk in any way undesirable?

No.

---

31. Have you reviewed all answers in this Report; and are you sure they are clear and complete? (Any erasures or alterations should be initialed by the Examiner.)

Yes.

---

32. Do you believe that the applicant has given full and true information in all respects?

Yes.

---

I certify that I have carefully examined Geo. Moats of Summerville, Oregon, in private at La Grande, Ore., this 16th day of March, 1911, for an insurance of \$10,000 on the applicant's life; that the applicant's "Answers made to the Medical Examiner" on the other side of this sheet are in my handwriting and are exactly as made by the applicant to me, and that the applicant signed them in my presence.

H. L. Underwood, M. D., La Grande, P. O. Address.

---

The Examiner is requested to send direct to the Company in New York City any information which,



for any reason, he prefers not to embody in this report. He can also mail this report direct to the Company if he prefers.

---

SPECIAL NOTICE TO MEDICAL EXAMINER.—The attention of the Medical Examiner is called to the fact that policies issued by this Company are free from all restrictions as to residence, travel or occupation, and are incontestable after one year. Every endeavor should be made, therefore, to make this report as complete and precise as possible; the object being to give the Home Office a pen picture of the applicant as he presents himself to you. If in addition, therefore, you know of any fact, or have any impression not expressed above, that in your judgment would probably influence the Home Office in its estimate of the risk, please note it below.

ADDITIONAL REMARKS.

**[McCall's Exhibit B.]**

Mar. 27, 1911.

HOME OFFICE MEMORANDUM.

This Memo must be attached OVER all the papers of the Application to which it refers, and must not be detached therefrom. All memoranda must be carefully typewritten, dated and initiated.

B. & F. H. 100-15.

Resid. ....

Occup'n 15.

Habits .....

Ph. Cond. ....

Pers'l H. ....

Race |70|

Policy No.

4,258,252.

4,258,253.

Branch Offices must be careful to fill in the information herein called for, before forwarding application to Home Office, otherwise the application will be suspended for particulars.

Mar. 23, 2:30 P. M.

X Name of Insured.

GEORGE SCOTT MOATS.

---

Date of Birth, Dec. 2nd, 1877. Age, 33. Amount \$10,000.

---

Residence: State, Oregon. County, Union. City, Town or Village, Summerville.

---

Post Office Address, Where the Premium Notices are to be sent.

---

State, Oregon. County, Union. City, Town or Village, Summerville. Street, X. No., X.

---

1. IDA MAY MOATS, wife, and GEORGE ALBERT MOATS. son.

(2) Name of Beneficiary.

---

Date 3|18|11 Application received at Oregon Branch

Office.

---

3|18|11 Memorandum for Inspection sent out G. L.

---

Date Mar. 23, 1911, (RECEIVED-INVOICED)  
(NO RECORD-INS. )

---

Mar. 23, 2 P. M. Index 18.

24, 1911, ADVISED AT PER CENT M 70 CLH.

---

FORWARDED POL. NO. AS ADVISED.

---

MAR. 24, 1911, REFERRED TO CLASS COM.  
o|a amt (Rule) A. Bergholz.

---

MAR. 24, 1911, Amt O K W S.

---

MAR. 25, 1911, RECEIVED IN DIV. POL. IS-  
SUES THIS DAY.

---

MAR. 27, 1911, FORWARDED POL. NO. 4,258,-  
252, 4,258,253 AS ADVISED Subj. Amend 3 & 8 M.

---

APR. 7, 1911, FILED BY NO. 42. APR. 17, 1911,  
FILED BY NO. 12.

---

DEAD.

---

9|14|11 Dr. Vander Poel wrote Dr. F. V. Brooks  
sent 9|14 H. R. Brown, Jr.

---

10|5|11 See letter filed herewith. H. R. Brown, Jr.

THE ONE USING LINE ABOVE, MUST ATTACH CONTINUATION SHEET.

2065. Jan., 1909.

## INSURANCE STATEMENT.

Number	Amount	Plan	Return Premium ¼, ½ or all	Insurance Commenced	Paid or Extended to	Agents
--------	--------	------	-------------------------------------	------------------------	------------------------------	--------

Total, \$.....

Less \$.....

Net risk, \$.....

Re-ins. in .....

**[McCall's Exhibit C.]**

O C 106948

RECEIVED from .....  
at ..... State of .....  
..... this ..... day of.....

1911 the sum of .....  
Dollars, in connection with his application for insurance in the New-York Life Insurance Company said application corresponding in date and number with this receipt and containing said applicant's declarations that he has paid the sum hereby receipted for, and that he assents to the terms of this receipt, as follows, to wit:

FIRST. That if a policy be delivered on said application, said Company shall accept this receipt as cash towards the payment of the first premium on said policy.

SECOND. That if the Company fails to offer to deliver a policy on said application within sixty days from this date, and if such failure is not attributable to the applicant's neglect or refusal to comply with the company's rules, regulations and requirements as to medical examination and other customary requirements in acting upon applications for insurance (and only in this event) the Company will return said sum to the applicant upon surrender of this receipt, otherwise the payment will be retained by the Company in consideration of the trouble and expense incurred on account of the application.

THIRD. That if said Company within sixty days



from this date offers to deliver to said applicant a policy of insurance, on the plan applied for, and said offer is refused, then said Company shall retain said sum in consideration of the trouble and expense it shall have incurred on account of said application.

FOURTH. That this receipt will not be valid for any sum in excess of the sum declared by said applicant in his said application to have been paid. It will not be valid if issued after DEC. 31, 1911. It will not be valid if any erasures or additions have been made in the printed form.

FIFTH. That this receipt is non-negotiable and cannot be assigned or transferred.

(Agent must sign here.)

.....Agent.

**[McCall's Exhibit D.]**

No. 4,258,252-3.

From Div. Pol. issues by J. S. Cole.

Name.....Moats.....

DIVISION OF POLICY ISSUES.

NEY-YORK LIFE INSURANCE COMPANY,

346 & 348 Broadway, New York.

Received Apr. 14, 1911, 10 P. M.

Policy Issues.

The NEW-YORK LIFE INSURANCE COMPANY will please accept the following answers in lieu of the answers to the corresponding questions in my application for insurance, dated the 16th day of Mar., 1911.

---

---

QUESTION No. 3.

Born 2nd day of December, 1877.

Age nearest birthday 33.

---

QUESTION No. 8.

Sum to be insured \$10,000 in 2 policies of \$5,000 each.

---

QUESTION No.....

---

QUESTION No.....

---

And I hereby agree that the above answers shall form a part of my said application for insurance, the agreements in which I hereby renew and confirm, and shall apply to any Policy issued thereon.

Dated Mar. 25th, 1911.

Witness X Ida Moats.

Sig. name in full.

GEORGE SCOTT MOATS, Applicant.

Forwarded from Oregon Branch Office 4|8, 1911.

M. MAXON,

EK

Cashier.

256. Oct., 1903.

(Endorsed on back).

DIVISION OF

APR. 17, 1911.

Files and Records.

Apr. 17, 1911, filed by No. 34.

74

STATE OF OREGON,

County of Union—ss.

I, Ed Wright, County Clerk and ex-officio Clerk of the County Court, of the State of Oregon, for the County of Union, which is a Court of Record, and a keeper of the Seal thereof, do hereby certify that Geo. T. Cochran, whose signature is affixed to the foregoing instrument was at the time of signing the same a Notary Public in and for said County and State, and that he is duly authorized and empowered to take such acknowledgement and that full faith and credit are due to his official acts. I further certify that the foregoing instrument was executed and acknowledged according to the laws of this State, and that I believe his signature to be true and genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court at La Grande, in said County and State, this 28 day of June, A. D., 1911.

ED WRIGHT,  
County Clerk.

( SEAL )  
( COUNTY COURT )  
( UNION COUNTY )  
( STATE OF OREGON )

By C. J. Scriber, Deputy.

[McCall's Exhibit E.]

Received Jul. 17, 1911, 9 A. M.

Policy Claims Division.

PROOFS OF DEATH.

CLAIMANT'S STATEMENT No. 1.

(Before making out this statement, read carefully the special instructions on the other side.)

---

1. No. of Policy, 4,258,252; Date of Policy, March 17th, 1911; Amount, \$5,000.

---

2. Name of deceased in full.

George Scott Moats.

3. Residence:

a. When policy was issued.

a. Summerville, Oregon.

b. At time of death.

b. Summerville, Oregon.

---

4. When was residence last changed?

Eleven years, 22nd day of this June.

---

5. Occupation:

a. When policy was issued.

a. Retired farmer.

b. At time of death.

b. Retired farmer.

---

6. Date of birth.

December 2nd, 1877.

---

7. Place of birth.

Mount Erie, Illinois.

---

8. State the source from which date of birth was obtained.

NOTE.—The Family Record, Certificate of Birth or other writings should be referred to.

Family Record.

---

9. a. Place of death.

a. Salem, Oregon.

b. Date of death.

b. 14th day of June, 1911.

---

10. Name and residence of every physician who attended deceased during the year prior to death.

Dr. J. W. Loughlin, La Grande, Org.

Dr. A. E. Tamiesie, Salem, Oregon.

---

11. In what other companies and for what amounts was life of deceased insured?

No other.

---

12. In what capacity, or by what title, do you claim this insurance?

As wife and Beneficiary.

---

13. What was your age at your last birthday?  
41 years.



Dated at La Grande, Oregon, this 28<sup>th</sup> day of June, 1911.

Signature, Mrs. Ida M. Moats.

Post-office address .....

OATH.

STATE OF OREGON,

County of Union—ss.

On this 28th day of June, 1911, personally appeared before me the above-named Mrs. Ida M. Moats, and having subscribed the same before me, thereupon made oath that the foregoing statements and answers made by her are true to the best of her knowledge and belief .

[Seal.]

GEO. T. COCHRAN,

Notary Public for Oregon.

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

(Indorsements on Back.)

POLICY No. 4,258,252.

---

---

PROOFS OF DEATH

Submitted to the

NEW YORK LIFE

Insurance Company.

346 & 348 Broadway, New York.

---

---

**STATEMENT No. 1.**

---

464. Nov., 1907. U. S.

**SPECIAL INSTRUCTIONS.**

STATEMENT No. 1 must be made by the person to whom the insurance is payable. If there is more than one beneficiary, all may join in one statement, or a separate blank will be furnished for each if desired.

When a Policy is payable to the legal representatives of the insured, the statement must be made by and executor or administrator, a certified copy of whose appointment and authority must be furnished.

When a Policy is payable to a named beneficiary of full age, the statement must be made by such beneficiary.

When a Policy is payable to a minor, the statement must be made by a guardian, a certified copy of whose appointment and authority must be furnished.

When a Policy has been assigned, the statement must be made by the assignee, and must be accompanied by the original assignment, or a certified copy thereof. In the latter case, the original assignment must be surrendered with the Policy when the claim is paid.

When a Policy was payable to a named beneficiary, and by the death of that beneficiary has become otherwise payable, a statement, duly certified, must be fur-

nished giving the place and date of death of the deceased beneficiary.

When a Policy or any part of it, is payable to "children" in general, a statement, duly certified, must be furnished, giving the names and dates of birth of all the children. If any have died, the statement must give the date of death, and must also state whether they died unmarried, intestate, and without issue.

---

STATEMENT No. 2 must be made by the physician in attendance during the last illness of the deceased, and must be entirely in his handwriting.

When a coroner's inquest has been held, a copy of the verdict, duly certified, must be furnished with this statement.

---

STATEMENT No. 3 must be made by a responsible householder, intimately acquainted with the deceased, and not interested in the claim.

---

All of the statements must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

---

Every question must be distinctly and fully answered, and the Company reserves the right to require further information should it be deemed necessary.

---

The intervention of any third person is not necessary for the collection of an approved claim, and the payment of a commission to any person for services in regard to such claim is unnecessary.

**[McCall's Exhibit E.]**

PROOFS OF DEATH.

CLAIMANT'S STATEMENT No. 1.

(Before making out this statement, read carefully the special instructions on the other side.)

---

1. No. of Policy, 4,258,253. Date of Policy, March 17th, 1911. Amount, \$5,000.

---

2. Name of deceased in full.

George Scott Moats.

3. Residence:

a. When policy was issued.

a. Summerville, Oregon.

b. At time of death.

b. Summerville, Oregon.

---

4. When was residence last changed?

Eleven years ago, 22 day of this June.

5. Occupation:

a. When policy was issued.

a. Retired farmer.

b. At time of death.

b. Retired farmer.

---

6. Date of birth.

December 2nd 1877.

---

7. Place of birth.

Mount Erie, Illinois.

8. State the source from which date of birth was obtained.

NOTE.—The Family Record, Certificate of Birth or other writings should be referred to.

Family Record.

---

9. a. Place of death.

a. Salem, Oregon.

b. Date of death.

b. 14th day of June, 1911.

---

10. Name and residence of every physician who attended deceased during the year prior to death.

Dr. J. W. Loughlin, La Grande, Oregon.

Dr. A. E. Tamiesie, Salem, Oregon.

---

11. In what other companies and for what amounts was life of deceased insured?

No other.

12. In what capacity, or by what title, do you claim this insurance?

As wife and Guardian of George A. Moats.

---

13. What was your age at your last birthday?

41 years.

---

---



Dated at La Grande, Oregon, this 28th day of June, 1911.

Signature, IDA M. MOATS.

Post-Office Address, Summerville.

Guardian of George A. Moats.

OATH.

STATE OF OREGON,

County of Union—ss.

On this 28th day of June, 1911, personally appeared before me the above-named Ida M. Moats guardian of George A. Moats, and having subscribed the same before me, thereupon made oath that the foregoing statements and answers made by her are true to the best of her knowledge and belief.

[Seal.]

GEO. T. COCHRAN,

Notary Public for Oregon.

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

(Endorsements on Back.)

POLICY NO. 4,258,253.

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---

PROOFS OF DEATH.

Submitted to the  
NEW YORK LIFE  
Insurance Company.

346 & 348 Broadway, New York.

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---

STATEMENT No. 1.

---

---

464. Nov. 1907, U. S.

SPECIAL INSTRUCTIONS.

STATEMENT No. 1 must be made by the person or persons to whom the insurance is payable. If there is more than one beneficiary, all may join in one statement, or a separate blank will be furnished for each if desired.

When a Policy is payable to the legal representatives of the insured, the statement must be made by an executor or administrator, a certified copy of whose appointment and authority must be furnished.

When a Policy is payable to a named beneficiary of full age, the statement must be made by such beneficiary.

When a Policy is payable to a minor, the statement must be made by a guardian, a certified copy of whose appointment and authority must be furnished.

When a Policy has been assigned, the statement must be made by the assignee, and must be accompanied by the original assignment, or a certified copy thereof. In the latter case, the original assignment must be surrendered with the Policy when the claim is paid.

When a Policy was payable to a named beneficiary, and by the death of that beneficiary has become other-

wise payable, a statement, duly certified, must be furnished, giving the place and date of death of the deceased beneficiary.

When a Policy, or any part of it, is payable to "children" in general, a statement, duly certified, must be furnished, giving the names and dates of birth of all the children. If any have died, the statement must give the date of death, and must also state whether they died unmarried, intestate, and without issue.

---

STATEMENT No. 2 must be made by the physician in attendance during the last illness of the deceased, and must be entirely in his handwriting.

When a coroner's inquest has been held, a copy of the verdict, duly certified, must be furnished with this statement.

---

STATEMENT No. 3 must be made by a responsible householder, intimately acquainted with the deceased, but not interested in the claim.

---

All of the statements must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

---

Every question must be distinctly and fully answered, and the Company reserves the right to require further information should it be deemed necessary.

---

The intervention of any third person is not necessary for the collection of an approved claim, and the payment of a commission to any person for services in regard to such claim is unnecessary.

STATE OF OREGON,

County of Union—ss.

I, Ed Wright, County Clerk and ex-officio Clerk of the County Court of the State of Oregon, for the County of Union, which is a Court of Record, and a keeper of the Seal thereof, do hereby certify that A. C. Williams, whose signature is affixed to the foregoing Proof of death was at the time of signing the same a Notary Public in and for said County and State, and that he is duly authorized and empowered to take such acknowledgement, and that full faith and credit are due to his official acts. I further certify that the foregoing instrument was executed and acknowledged according to the laws of this State, and that I believe his signature to be true and genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court at La Grande, in said County and State, this 26 day of July, A. D., 1911.

ED WRIGHT,  
County Clerk.

( SEAL )  
( COUNTY COURT )  
( UNION COUNTY )  
( STATE OF OREGON )

**[McCall's Exhibit E.]**

NOTE.—This Statement must be entirely in the handwriting of the Physician.

**PROOFS OF DEATH.****PHYSICIAN'S STATEMENT No. 2.**

(Before making out this Statement, read carefully, the Special instructions on the other side.)

---

1. Name of deceased in full.

George Scott Moats.

---

2. How long had you known deceased?

Since March 16, 1911.

---

3. Where did deceased reside at time of death?

Oregon Insane Asylum, Salem, Ore.

---

4. What was deceased's former residence?

Summerville, Or.

---

5. What have been deceased's several occupations to your knowledge?

Soldier and farmer.

---

6. What was the age at death?

About 34 years.....months.....days.

---

7. State as accurately as you can the following facts in regard to deceased's personal appearance:

Height? 5 feet 10 inches. Color of Hair? Dark.



Approximate weight in health? 190 lbs. Color of eyes? Dark.

---

8. a. Place of death.

a. Salem, Oregon.

b. Date of death.

b. About June 14th, 1911.

---

9. How long had you been the medical attendant or adviser of deceased?

Since March 16th.

---

10. a. For what diseases did you treat or advise deceased prior to last illness?

a. Nervousness and sleeplessness.

b. Give date, duration and result of each.

b. Mch. 16th.

---

11. a. What disease was the immediate cause of death?

a. Don't know.

b. How long in your opinion, did deceased suffer from this disease?

b.

---

12. a. From what other important diseases, if any, did deceased suffer?

a. None, that I know of.

b. Give as nearly as you can, the duration of each one.

b.

Received Aug. 1, 1911. 9 A. M.

Policy Claims Division.

---

13. When were you first consulted by deceased, or by any relative or friend, for the affection which either directly or indirectly caused death?

March 16th, 1911.

14. Was there any special cause, direct or indirect, for the death, in the use of alcoholic beverages, occupation, or residence of deceased?

None.

15. For how long a time was deceased confined to the house, or prevented from attending to business?

This man had been in asylum before his death.

16. a. Was there a coroner's inquest or a post-mortem examination on the body of deceased?

a. I don't know.

b. If so, which, by whom, and with what result?

b.

17. Did any other physicians attend deceased during last illness? If so, give name and address of each.

Physicians at Salem Asylum attended him in last illness.

18. a. Where did you receive your medical education?

a. Bowdoin Medical School.

b. What is the date of your graduation?

b. 1900.

Dated at La Grande, Or., this 26 day of July, 1911.

Signature JAMES W. LOUGHLIN, M. D.,  
Post-Office Address, La Grande, Or.  
OATH.

STATE OF OREGON,

County of Union—ss.

On this 26 day of July, 1911, personally appeared before me the above-named James W. Loughlin and having subscribed the same before me, thereupon made oath that the foregoing statements and answers by him made are true to the best of his knowledge and belief, and that no material fact has been concealed from the Company.

A. C. WILLIAMS,

Notary Public for Oregon.

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

(Endorsed on Back.)

POLICY NO.

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---

PROOFS OF DEATH.

Submitted to the

NEW YORK LIFE

INSURANCE COMPANY

346 and 348 Broadway, New York.

---

---

STATEMENT No. 2.

---

---

464. June, 1909, U. S.

## SPECIAL INSTRUCTIONS.

STATEMENT No. 2 must be made by the physician in attendance during the last illness of deceased, and must be entirely in his own handwriting.

---

In answer to Questions 9, 10, 11 and 12, a full statement of each Pathological Process, especially as to its DURATION and RESULTS, should be given.

---

Where death is the result of Accident or Injury, the word LESION may be understood to replace the word DISEASE, in Question 8.

---

Such indefinite terms as Heart Failure, Exhaustion, and the like, should be avoided, unless full details are added.

---

Where the spaces provided for the answers are too small, such details as seem desirable should be given below.

---

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

---

When a coroner's inquest has been held, a copy of the verdict, duly certified, must be furnished with this statement.

---

Every question must be distinctly and fully answered, and the Company reserves the right to require further information should it be deemed necessary.

---

The intervention of any third person is not necessary for the collection of an approved claim, and the payment of a commission to any person for services in regard to such claim is unnecessary.

---

#### ADDITIONAL DETAILS.

STATE OF OREGON,

County of Marion—ss.

No. 256.

I, R. D. ALLEN, County Clerk and Clerk of the County Court of the State of Oregon, in and for said County; said court being a Court of Record, do hereby certify that R. B. GOODWIN, whose name is subscribed to the Certificate of Proof or Acknowledgement of the annexed instrument and thereon written, was at the time of taking such proof or acknowledgement, a Notary Public in and for said County, dwelling in said County commissioned and sworn and duly authorized to take the same, and to take a certificate and Acknowledgement of Proof of Deeds to be recorded. And further that I am well



acquainted with the hand writing of said Notary, and verily believe the signature to said certificate of proof or acknowledgement is genuine, and that the same is taken and executed according to the laws of the State of Oregon.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 29 day of June, A. D., 1911.

R. D. ALLEN,

Clerk.

-----Deputy.

**[McCall's Exhibit E.]**

NOTE.—This statement must be entirely in the handwriting of the Physician.

**PROOFS OF DEATH.**

**PHYSICIAN'S STATEMENT No. 2.**

(Before making out this Statement, read carefully the Special Instructions on the other side.)

---

1. Name of deceased in full.

George S. Moats.

---

2. How long had you known deceased?

Since Apl. 18th, 1911.

---

3. Where did deceased reside at time of death?

Residence, Summerville, Oreg. Died at asylum.

---

4. What was deceased's former residence?

Other than in Question 3 unknown.

---

5. What have been deceased's several occupations to your knowledge?

Farmer.

---

6. What was the age at death?

33 years.....month.....days.

---

7. State as accurately as you can the following facts in regard to deceased's personal appearance:

Height? 5 feet 9 inches. Color of hair? dark. Approximate weight in Health? 170 lbs. Color of eyes? Brown.

---

8. a. Place of death.

a. State Insane Asylum of Oregon.

b. Date of death.

b. June 14th, 1911.

---

9. How long had you been the Medical Attendant or adviser of deceased?

Last time from June 11th, 1911 to date of death.

---

10. a. For what diseases did you treat or advise deceased prior to last illness?

a. Insanity from Apl. 18, 1911, to May 9th, 1911.

b. Give date, duration and result of each.

b. Date as above recovered.

---

11. a. What disease was the immediate cause of death?

a. Delirium collapse following acute maniacal excitement.

b. How long, in your opinion, did deceased suffer from this disease?

b. Became maniacal shortly after admission.

---

12. a. From what other important diseases, if any, did deceased suffer?

a. None.

b. Give, as nearly as you can, the duration of each one.

b.

---

13. When were you first consulted by deceased, or by any relative or friend, for the affection which either directly or indirectly caused death?

First commitment to Asylum, Apl. 18, 1911.

---

14. Was there any special cause, direct or indirect, for the death, in the use of alcoholic beverages, occupation, or residence of deceased?

No.

---

15. For how long a time was deceased confined to the house, or prevented from attending to business?

5 days.

---

16. a. Was there a coroner's inquest or a post-mortem examination on the body of deceased?

a. No.

- b. If so, which, by whom, and with what result?  
b.
- 

17. Did any other physicians attend deceased during last illness? If so, give name and address of each.  
No.

---

18. a. Where did you receive your medical education?

- a. Oregon, Chicago, Ill.; New York City.  
b. What is the date of your graduation?  
b. 1902.
- 

Dated at Salem, Or., this 29th day of June, 1911.

Signature, A. E. TAMIESIE.

Post-Office Address, Salem, Oregon.

OATH.

STATE OF OREGON,

County of Marion—ss.

On this 29th day of June 1911, personally prepared before me the above-named A. E. Tamiesie, and having subscribed the same before me, thereupon made oath that the foregoing statements and answers by him made are true to the best of his knowledge and belief, and that no material fact has been concealed from the Company.

( R. B. GOODIN )  
( NOTARY )  
( SEAL )  
( PUBLIC )  
( STATE OF OREGON )

B. R. GOODIN,  
Notary Public for Oregon.  
Salem, Oregon.

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

(Endorsement on Back.)

POLICY No.

---

---

PROOFS OF DEATH.

Submitted to the  
NEW YORK LIFE  
Insurance Company,  
346 and 348 Broadway, New York.

---

---

STATEMENT NO. 2.

---

---

464. June, 1909, U. S.

SPECIAL INSTRUCTIONS.

STATEMENT No. 2 must be made by the physician in attendance during the last illness of deceased, and must be entirely in his own handwriting.

---

In answer to Questions 9, 10, 11 and 12, a full statement of each Pathological Process, especially as to



its DURATION and RESULTS, should be given.

---

Where Death is the result of Accident or Injury, the word LESION may be understood to replace the word DISEASE, in Question 8.

---

Such indefinite terms as Heart Failure, Exhaustion, and the like, should be avoided, unless full details are added.

---

Where the spaces provided for the answers are too small, such details as seem desirable should be given below.

---

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

---

When a coroner's inquest has been held, a copy of the verdict, duly certified, must be furnished with this statement.

---

Every question must be distinctly and fully answered, and the Company reserves the right to require further information, should it be deemed necessary.

---

The intervention of any third person is not neces

sary for the collection of an approved claim, and the payment of a commission to any person for services in regard to such claim is unnecessary.

---

### ADDITIONAL DETAILS.

#### [McCall's Exhibit E.]

#### PROOFS OF DEATH.

##### FRIEND'S STATEMENT NO. 3.

This statement must be made by a person of legal age, intimately acquainted with, but not related to the deceased, who is not interested in the claim, and has seen the remains.

---

1. Name of Deceased in full.

George Scott Moats.

---

2. How long have you known deceased?

About 10 years.

---

3. Where has deceased resided during your acquaintance?

Summerville, Oregon.

---

4. What has been deceased's several occupations?

Farming and stockraising.

---

5. What was the age of deceased?

About 33 years old.

---

6. a. Place of death.

- a. Salem, Oregon.
  - b. Date of death.
  - b. June 14th, 1911.
- 

7. Have you seen the body?

Yes.

---

8. Do you know the deceased to be the person whose life was insured in the Policy of Insurance upon which the claim is based?

Yes.

---

9. Date of burial.

June 18th, 1911.

---

10. Place of burial.

Summerville Cemetery.

---

11. What is your age?

My age 62 years.

---

12. What is your occupation?

Undertaker and Furniture Dealer and County Judge.

---

13. How long have you resided at your present address?

About 35 years.

---

14. Are you a relative of deceased?

No.

---

15. Are you, in any way, directly or indirectly interested in the proceeds of any insurance on the life of deceased?

No.

---

16. a. Are you a policy-holder in this Company?

a. No.

b. If so, state the number of your policy.

b.....

---

Dated at La Grande, Ore., this 28 day of June 1911.

Signature, J. C. HENRY,

Post-Office Address, La Grande, Oregon.

OATH.

STATE OF OREGON,

County of Union—ss.

On this, 28 day of June, 1911, personally appeared before me the above named J. C. Henry, and having subscribed the same before me, thereupon made oath that the foregoing statements and answers by him made are true to the best of his knowledge and belief, and no material fact has been concealed from the Company.

[Seal.]

ED WRIGHT,

County Clerk.

By C. J. Scriber, Deputy.

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be at-

tested by the Clerk of a Court of Record, under his official seal.

(Indorsed on Back.)

POLICY NO.

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---

PROOFS OF DEATH

Submitted to the  
NEW YORK LIFE  
Insurance Company,  
346 and 348 Broadway, New York.

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---

STATEMENT NO. 3.

Mt. View San.

1. Mch. 21-28.

2. Apr. 11-18 thence to Salem.

---

---

464. Nov., 1907, U. S.

SPECIAL INSTRUCTIONS.

STATEMENT NO. 3 must be made by a responsible householder, intimately acquainted with the deceased, and not interested in the claim.

---

The statement must be sworn to before an officer duly authorized to administer oaths, and his authority and the genuineness of his signature must be attested by the Clerk of a Court of Record, under his official seal.

---



Every question must be distinctly and fully answered, and the Company reserves the right to require further information should it be deemed necessary.

---

The intervention of any third person is not necessary for the collection of an approved claim, and the payment of commission to any person for services in regard to such claim is unnecessary.

**[McCall's Exhibit E.]**

BE IT REMEMBERED, That at a regular term of the County Court of the State of Oregon, for the County of Union, in probate sitting, begun and held at the Court House in the City of La Grande, in said County and State, on Monday, the 5th day of June, A. D., 1911, the same being the first Monday of said month and the time fixed by law for holding a regular term of said Court, when were present:

The Honorable J. C. HENRY,

County Judge.

ED WRIGHT,

Clerk.

F. P. CHILDERS,

Sheriff.

WHEN, on Friday, the 23 day of June, A. D., 1911, or the 10 Judicial Day of Said term, among others the following proceedings were had, to-wit:

In the Matter of the Guardianship of

GEORGE A. MOATS, a Minor.

ORDER APPOINTING GUARDIAN.

On this the 23rd day of June, 1911, this matter came

before the Court upon the petition of Ida M. Moats, for the appointment as guardian of George A. Moats, a minor child of George S. Moats, deceased.

It appearing to the court that the petitioner is the mother of the said minor child, who is the only child of George S. Moats, deceased. That said minor has no guardian legally appointed by will and is a resident of Union County and has an estate within Union County, Oregon, which needs the care and attention of some fit and proper person. That the property of the said minor consists of the amount due upon a policy of insurance for \$5,000.00 in the New York Life Insurance Company, which has not yet been collected, and that said George A. Moats is of the age of eight years and is at the present time under the care of his mother, the petitioner herein.

It further appearing that the petitioner is a resident and inhabitant of the County of Union, State of Oregon, and is entitled to be appointed guardian of said child.

Now, therefore, it is CONSIDERED, ORDERED, ADJUDGED and DECREED by the Court that Ida M. Moats of Summerville, Union County, Oregon, be, and she is hereby appointed as guardian of the person and estate of George A. Moats, a minor.

It is further ORDERED that the guardian give a bond with surety or sureties to the State of Oregon in the sum of \$6,000.00 conditioned as by law provided and to the approval of this court.

It is further ORDERED that Letters of Guardian-

ship issue to Ida M. Moats upon the filing and approval of said bond.

It is further ORDERED that F. L. Meyers, Dr. A. L. Richardson and Charles E. Cochran be, and they are hereby appointed appraisers of said estate.

(Signed) J. C. HENRY,

County Judge.

STATE OF OREGON,

County of Union—ss.

I, ED WRIGHT, County Clerk and Ex-Officio Clerk of the County Court of Union County, State of Oregon, do hereby certify that the foregoing copy of Order appointing Guardian, in the matter of the guardianship of George A. Moats, a minor, has been compared by me with the original, and it is a correct transcript therefrom, and of the whole of such original Order as the same appears of record in my office and in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 28th day of June, A. D., 1911.

ED WRIGHT,

County Clerk.

By Anna Alexander, Deputy.

[McCall's Exhibit F.]

Form 2289 B.

8. 22. '11. Deny Liability.

J.

NIGHT LETTER

THE WESTERN UNION TELEGRAPH COMPANY.

Incorporated.

25,000 OFFICES IN AMERICA.

CABLE SERVICE TO ALL THE WORLD.

This Company TRANSMITS and DELIVERS messages only on conditions limiting its liability, which have been assented to by the sender of the following Night Letter.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of Unrepeated Night Letters, sent at reduced rates, beyond a sum equal to ten times the amount paid for transmission; nor in any case beyond the sum of Fifty Dollars, at which, unless otherwise stated below, this message has been valued by the sender thereof, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

This is an UNREPEATED NIGHT LETTER, and is delivered by request of the sender under the conditions named above.

THEO. N. Vail, PRESIDENT.

BELVIDERE BROOKS, GENERAL MANAGER.

RECEIVED AT the WESTERN UNION BUILD-  
ING, 195 Broadway, N. Y.

ALWAYS  
OPEN

U334CH. L-ONE. 79, COLLECT, N. L.

LAGRANDE, ORE., AUGUST 21ST, '11.

JOHN C. MC CALL,  
346 BROADWAY,  
NEW YORK

MOATS TREATED MARCH THIRD AND FOURTEENTH FOR NEURASTHENIA HISTORY ONE MONTH. MARCH SIXTEENTH, FIVE HOURS PRIOR TO EXAMINATION FOR OUR POLICY WAS TREATED FOR SAME TROUBLE, MARCH EIGHTEENTH TREATED BY OSTEOPATH FOR NERVOUS PROSTRATION. MARCH TWENTIETH ENTERED SANATORIUM, LEFT MARCH TWENTY EIGHTH RETURNED APRIL ELEVENTH COMMITTED TO ASYLUM APRIL EIGHTEENTH LIBERATED MAY FOURTH, RECOMMITTED JUNE FOURTH, ASYLUM HISTORY NEGATIVE. RECORDS SHOW NO PHYSICAL DISEASE DISCOVERABLE, LOCAL PHYSICIANS AMAZED THAT POLICY WAS ISSUED. INVESTIGATION COMPLETED PLEASE WIRE INSTRUCTIONS IMMY.

A. J. PICKFORD 337 AM

The hour of four o'clock now having arrived the further taking of said depositions is now here adjourned until tomorrow morning at ten o'clock in the forenoon before me at the same place.

Tuesday, April 30, 1912.

Pursuant to the adjournment had on yesterday the further taking of said depositions is continued at



my office at the hour of ten o'clock, present, the same persons as on yesterday.

NORMAN R. HASKELL, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith as follows:

First Interrogatory:

Please state your name, age, place of residence and occupation.

Answer to First Interrogatory:

Norman R. Haskell; age forty-eight; I reside in Brooklyn, New York, and by occupation I am Superintendent of the Division of Policy Claims of the New York Life Insurance Company, defendant.

Second Interrogatory:

How long have you been Superintendent of the Division of Policy Claims of the defendant?

Answer to Second Interrogatory:

Nine years.

Third Interrogatory:

Who in the defendant's employ has jurisdiction over the Division of Policy Claims?

Answer to Third Interrogatory:

Second Vice-President John C. McCall.

Fourth Interrogatory:

Who has immediate supervision of its work?

Answer to Fourth Interrogatory:

I have.

Fifth Interrogatory:

How long have you been in your present em-

ployment?

Answer to Fifth Interrogatory:

Thirty years.

Sixth Interrogatory:

How long have you been Superintendent of the Division of Policy Claims?

Answer to Sixth Interrogatory:

For nine years last past.

Seventh Interrogatory:

What are, and during the nine years last have been your duties as Superintendent of the Division of Policy Claims?

Answer to Seventh Interrogatory:

Superintendent of the payment of and to pay all obligations falling due under the Company's policy contracts, except the granting of policy loans.

Eighth Interrogatory:

When, if you know, did you first receive any proofs of the death of George Scott Moats?

Answer to Eighth Interrogatory:

On the 17th day of July, 1911.

Ninth Interrogatory:

What did the proofs of death consist of that you received at that time?

Answer to Ninth Interrogatory:

Claimant's Statement No. 1, purporting to be signed by Mrs. Ida M. Moats, a photographic copy of which is attached to the deposition of John C. McCall, and identified by him as Mc-

Call's Exhibit E; claimant's statement No. 1, purporting to be signed by Ida M. Moats, guardian of George A. Moats, photographic copy of which is attached to the deposition of John C. McCall in this case and identified by him as McCall's Exhibit E; physician's statement No. 2, purporting to be signed by Dr. A. Tamiesie, photographic copy of which is attached to the deposition of John C. McCall in this case and identified by him as McCall's Exhibit E, and friend's statement No. 3, purporting to be signed by J. C. Henry, photographic copy of which is attached to John C. McCall's deposition in this case, and identified by him as McCall's Exhibit E, and the letters of guardianship, photographic copies of which are attached to the deposition of John C. McCall in this case and identified by him as McCall's Exhibit E.

**Tenth Interrogatory:**

After you received the proofs of death which you have described, what did you do with them?

**Answer to Tenth Interrogatory:**

I examined them for the purpose of seeing whether or not they were satisfactory.

**Eleventh Interrogatory:**

Did you, or not, find them satisfactory?

**Answer to Eleventh Interrogatory:**

I found them unsatisfactory.

## Twelfth Interrogatory:

Why?

## Answer to Twelfth Interrogatory:

Because claimant's statement No. 1 showed that Dr. J. W. Loughlin attended the deceased during the year prior to his death, and I was unwilling to approve the proofs of death without and affidavit from Dr. Loughlin on the defendant's form, known as physician's statement No. 2.

## Thirteenth Interrogatory:

Did you or not send for physician's statement No. 2 to be made out by Dr. Loughlin?

## Answer to Thirteenth Interrogatory.

I did.

## Fourteenth Interrogatory.

When?

## Answer to Fourteenth Interrogatory:

July 19.

## Fifteenth Interrogatory:

Did you thereafter receive physician's statement No. 2, purporting to be filled out by Dr. Loughlin?

## Answer to Fifteenth Interrogatory:

I did.

## Sixteenth Interrogatory:

When?

## Answer to Sixteenth Interrogatory:

August 1, 1911.

## Seventeenth Interrogatory:

You may examine the paper attached to the

deposition of John C. McCall in this case, purporting to be a photographic copy of physician's statement No. 2, signed by James W. Loughlin, and identified by Mr. McCall as McCall's Exhibit E, and state whether or not said McCall's Exhibit E is a photographic copy of the paper which you referred to as having been received from Dr. Loughling.

Answer to Seventeenth Interrogatory:

It is.

Eighteenth Interrogatory:

When did you receive it?

Answer to Eighteenth Interrogatory:

April 1, 1911.

Nineteenth Interrogatory:

When you received Dr. Loughlin's physician's statement No. 2, what action, if any, did you take?

Answer to Nineteenth Interrogatory:

I conferred with Second Vice-President McCall.

Twentieth Interrogatory:

What was the result of your conference?

Answer to Twentieth Interrogatory:

We concluded to, and did send our A. J. Pickford, an Inspector in the Company's employ at the Home Office of the Company, out to Oregon to investigate the truth of the statements made by Mr. Moats in his application for this insurance.



**Twenty-first Interrogatory:**

What led you to take this action?

**Answer to Twenty-first Interrogatory:**

The answer made by Dr. Loughlin in his physician's statement No. 2, a photographic copy of which is attached to Mr. McCall's deposition in answering question No. 10 in said Exhibit E.

**Twenty-second Interrogatory:**

You may look at the papers which are attached to the deposition of John C. McCall in this case, and are identified by him as McCall's Exhibit A, and state whether or not you have seen the originals of which those papers purport to be copies?

**Answer to Twenty-second Interrogatory:**

Yes, I have seen said originals. I saw them in my Division at the Home Office of the defendant on the 17th day of July, 1911, at the same time that I received there the proofs of death which I have above described as having been received in my Division on that date.

**Twenty-third Interrogatory:**

When did you first receive any notice or knowledge that said George S. Moats had been treated by a physician on the 16th day of March, 1911?

**Answer to twenty-third Interrogatory:**

On the 1st day of August, 1911, when I received Dr. Loughlin's physician's statement No. 2.

Twenty-fourth Interrogatory:

When, if at all, did you first hear from Mr. Pickford after the defendant sent him to Oregon to investigate the truth about the representations made by Mr. Moats at the time he applied for this policy?

Answer to Twenty-fourth Interrogatory:

On the 21st or 22nd day of August, 1911.

Twenty-fifth Interrogatory:

How did you receive that information?

Answer to Twenty-fifth Interrogatory:

By telegram.

Twenty-sixth Interrogatory:

You may examine the photographic copy of a telegram which is attached to the deposition of John C. McCall in this case and identify by him as McCall's Exhibit F, and state whether or not that is a true copy of the original telegram which you received from Mr. Pickford, giving the result of his investigation of the case?

Answer to Twenty-sixth Interrogatory:

It is.

Twenty-seventh Interrogatory:

What action did you take after the receipt of that telegram?

Answer to Twenty-seventh Interrogatory:

I consulted with Second Vice-President McCall and we instructed Mr. Pickford to deny liability on the Moats policies, and to tender

return of the premiums received.

(Sgd.) NORMAN R. HASKELL.

Sibscribed in my presence and sworn to before me this 30th day of April, 1912.

[Seal.] (Sgd.) LOUIS H. COOKE,

Notary Public, New York County, No. 108; and New York Register No. 4032.

My commission expires March 30, 1914.

ALFRED J. PICKFORD, of lawful age, being by me duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith as follows:

First interrogatory:

Please state your name, age, place of residence and occupation.

Answer to First Interrogatory:

My name is Albert J. Pickard; age forty-five; I reside in Brooklyn, in the State of New York, and I am in the employ of the New York Life Insurance Company, defendant, as a special inspector.

Second Interrogatory:

How long have you been so employed?

Answer to Second Interrogatory:

For eight years last past.

Third Interrogatory:

What are and during the eight years last past have been your duties as a special inspector of the defendant?

Answer to Third Interrogatory:

To got to any locality where I am directed to

go and there investigate the truth of any fact I am sent to investigate, such as the truth of representations made by the policy holder at the time he applied for his policy, or questions growing out of the time and manner of an insured's death, and the like, whatever investigation of the kind arises in the Company's business and I am given direction to investigate, and to do such things in connection with my investigation as the facts discovered may warrant, such things, for instance, as making tenders, giving notices, and whatever else the situation will justify when the facts as they turn out to be will warrant.

**Fourth Interrogatory:**

You may state as to whether or not the defendant sent you from its Home Office to the State of Oregon for the purpose of investigating the question of the truth of the representations made by George Scott Moats, late of Summer-ville, Oregon, as made by him in his application, including his declaration made to the defendant's Medical Examiner for policies No. 4,-248,252 and 4,258,253.

**Answer to Fourth Interrogatory:**

It did.

**Fifth Interrogatory:**

When?

**Answer to Fifth Interrogatory:**

August 8, 1911.

**Sixth Interrogatory:**

Did you in making that journey have with you the defendant's Home Office memorandum record and the papers that belong therewith in the defendant's file?

**Answer to Sixth Interrogatory:**

I did.

**Seventh Interrogatory:**

You may examine the papers which have been identified by the witness as John C. McCall's Exhibit A and McCall's Exhibit B, and which are attached to, made a part of and are to be returned with his deposition in this case, and after you have examined them, state as to whether or not said McCall's Exhibit A and McCall's Exhibit B are true copies of the papers which you had with you when you made the journey you say you made.

**Answer to Seventh Interrogatory:**

They are.

**Eighth Interrogatory:**

Did you, or not, also have with you the proofs of death that have been furnished to the defendant?

**Answer to Eighth Interrogatory:**

I did.

**Ninth Interrogatory:**

You may examine the paper which the witness McCall has identified as McCall's Exhibit E, and which is attached to, made a part of,



and to be returned with his deposition in this case, and state whether or not McCall's Exhibit E are true copies of the proofs of death which you had with you at that time?

Answer to Ninth Interrogatory:

They are.

Tenth Interrogatory:

When did you arrive in Oregon?

Answer to Tenth Interrogatory:

I arrived in La Grande, Oregon, on or about August 17, and, of course, reached the State a short time before that.

Eleventh Interrogatory:

What investigation did you make of the truth of the statement contained in McCall's Exhibit A?

Answer to Eleventh Interrogatory:

I made an extended investigation which consisted of inquiry of various persons, including Dr. N. Molitor, of La Grande, Dr. Loughlin, of La Grande, Dr. Richardson of La Grande, Dr. Underwood, Dr. Zimmerman, Dr. Williamson and Dr. Galbreath of Mt. View Sanatorium in Portland, the matron in charge of the Mt. View Sanatorium and various other persons.

Twelfth Interrogatory:

How long did your investigation last?

Answer to Twelfth Interrogatory:

Four or five days.

Thirteenth Interrogatory:

Did you after making your investigation send

a report to the Home Office in New York as to what you found?

Answer to Thirteenth Interrogatory:

I did.

Fourteenth Interrogatory:

You may examine the paper which has been identified by the witness McCall in his deposition as McCall's Exhibit F, and which is attached to, made a part of and to be returned with Mr. McCall's deposition, and state whether or not McCall's Exhibit F is a true photographic copy of the telegram which you sent to Mr. McCall at the Home Office as a result of the investigation you made in Oregon prior to the date which the telegram bears?

Answer to Fourteenth Interrogatory:

It is.

Fifteenth Interrogatory:

After you sent McCall's Exhibit F, did you receive any further instructions from the Home Office?

Answer to Fifteenth Interrogatory:

I did.

Sixteenth Interrogatory:

Pursuant to those instructions what did you do?

Answer to Sixteenth Interrogatory:

I returned to Summerville and there called upon Mrs. Moats, the wife of George Scott Moats, and the guardian of George Albert Moats.

Seventeenth Interrogatory:

What conversation did you have with her, if any?

Answer to Seventeenth Interrogatory:

I told her that I came to see her as the wife of George Scott Moats, and as the guardian of George Albert Moats. I gave her my name and told her I was from the Home Office of the defendant, and had been sent out to investigate the question of the truth of the statements made by Mr. Moats in procuring the insurance on his life with the defendant, and that after a full investigation I found that the statements contained in his application, especially the statements made by him to the Company's Medical Examiner were untrue, and that if Mr. Moats had told the Company the truth in answer to the questions put to him by the defendant's Medical Examiner, the Company never would have accepted his application, and for that reason the Company had elected to rescind the contract and that I had come to return to her personally, and as guardian of George Albert Moats, all the premiums the Company had received on said two policies, with legal interest thereon from the time the Company received the premiums until that date.

Eighteenth Interrogatory:

Now kindly state what further was said and done in that interview, if anything?

## Answer to Eighteenth Interrogatory:

After telling Mrs. Moats that the Company having just discovered that the two policies had been obtained by fraudulent misrepresentations, and for that reason it elected to rescind the contract, I then counted out to her and offered to her \$275.48, all in gold coins of the United States, except the forty-eight cents, forty-five of which was in United States silver and nickels and the balance in copper coin of the United States, and explain to her that this \$275.48 consisted of all the premiums received on said two policies, namely, \$268.30, with 6 per cent interest thereon from the 16th day of March, 1911, to the 23rd day of August, 1911, but she refused to receive the money, saying that she declined to accept it and would bring suit against the Company on the Policies.

(Signed) ALBERT J. PICKFORD,

Subscribed in my presence and sworn to before me this 30th day of April, 1912.

[Seal.] (Signed) LOUIS H. COOKE,

Notary Public, New York County, No. 108 and  
New York Register No. ....

My commission Expires March.

STATE, COUNTY and

City of New York—ss.

I, LOUIS H. COOKE, a Notary Public duly commissioned and qualified for, and residing in said County and State, do hereby certify that the above depo-

sitions of John C. McCall, Norman R. Haskell and Albert J. Pickford were duly taken before me, pursuant to the annexed notice, at my office, 346 Broadway, in the City of New York and State of New York, on the 29th day of April, 1912, at eleven o'clock A. M., and thereafter on the 30th day of April, as shown by the adjournment above noted, and that said witnesses were each there and then by me duly and severally, carefully examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and after being so sworn, they each gave their depositions as above shown; that their said depositions were taken down in short-hand under my personal supervision by Ida Taylor, who is not attorney or relative of either party, or otherwise interested in the event of said suit, and were by her duly reduced to typewriting from her shorthand notes in my presence and under my personal supervision: that thereupon each of said witnesses read over his said deposition in my presence and there and then subscribed and swore to the same; that said depositions were retained by me in my possession until they were, and they were by me duly sealed up, endorsed, addressed and transmitted to the Clerk of said Court; that I am not attorney or relative of either party, or otherwise interested in the event of said suit; that the reason for taking said depositions is, and the fact is, that each of said witnesses reside in the State of New York, more than one hundred miles from the place of the trial of said cause.



IN WITNESS WHEREOF I have hereunto set my hand and notarial seal at the City of New York this 30th day of April, 1912.

[Seal.]

LOUIS H. COOKE,  
Notary Public.

Notary Public, New York County, No. 108; and New York Register No. 4032.

My Commission Expires March 30, 1914.

Cost of taking these depositions \$40, paid by defendant.

[Seal.]

LOUIS H. COOKE,  
Notary Public, New York County, No. 108; and New York Register No. 4032.

My Commission Expires March 30, 1914.

(Mr. MONTGOMERY):

Now, if the court please, I desire to offer in evidence at this time a certified copy of the records of the County Court of the State of Oregon, for the County of Multnomah, prepared and certified to by F. S. Fields, County Clerk, by T. J. Cleeton, County Judge, and again by F. S. Fields, County Clerk, certifying to the genuineness of the signature of the county judge, showing the proceedings with reference to the commitment of George Moats to the Oregon Insane Asylum on the 18th day of April, 1911, and ask that the same be received in evidence, and marked as Defendant's Exhibit.

Mr. COCHRAN: We object as incompetent, immaterial and irrelevant, for the reason that the liability of the defendant corporation is fixed and deter-

mined as of the date of the application, and that anything that happened subsequent to that is immaterial, and especially the record as being an unofficial record.

COURT: I think it is competent. It is a part of the history of this case, for the purpose of showing, if it does show, that he was committed to the asylum. I presume that was the object of the offer.

Mr. COCHRAN: We ask that the document be received only for the purpose of showing the commitment.

COURT: That there was an order of the county court upon a hearing and examination—there was an order of commitment.

Mr. COCHRAN: Not as far as the contents show the condition of Mr. Moats.

COURT: I don't know about that.

Mr. MONTGOMERY: A judicial proceeding under the statute.

Commitment marked "Defendant's Exhibit C." And thereupon the said Exhibit C, of which the following is a copy was received in evidence.

*In the County Court of the State of Oregon for the  
County of Multnomah.*

In the Matter of the Examination and  
Commitment of George Moats, an Insane Person.

Complaint.

To the Hon. T. J. Cleeton, County Judge of said County:

The undersigned petitioner respectfully represent

and show to your honor that .....  
 householder of this county; that .....George  
 Moats is an insane person, and by reason of such is  
 unfit to be at large and is a proper subject for con-  
 finement in the Insane Asylum of this state .....

WHEREFORE, your petitioner pray that you  
 cause said George Moats to be brought before you,  
 at such place as you may direct, and due inquiry made  
 as prescribed by law concerning the matters alleged  
 in this petition.

M. ELLA TOMPKINS.

STATE OF OREGON,

County of Multnomah—ss.

M. Ella Tompkins the petitioner above named, be-  
 ing first duly sworn, severally say that the forego-  
 ing petition is true as I verily believe.

M. ELLA TOMPKINS.

Subscribed and sworn to before me this 17th day of  
 April, A. D., 1912.

[Co. Court Seal.]

F. S. FIELDS,

T. F. NORTON.

BE IT REMEMBERED, That at a regular term of  
 the County Court of the State of Oregon for the  
 County of Multnomah, begun and held at the Court  
 House in said County and State, on the 18th day of  
 April, A. D., 1911, when were present; The Honor-  
 able T. J. Cleeton, Judge, presiding; .....,  
 Clerk; ....., Sheriff; .....  
 ....., District Attorney.

Whereupon, on the 18th day of April, A. D., 1911, the following proceedings were then had, to wit:

IN THE MATTER OF THE EXAMINATION  
AND COMMITMENT OF GEORGE  
MOATS, An Insane Person.

ORDER OF COMMITMENT.

By virtue of a complaint and petition filed in the above-entitled matter, I this day caused the said George Moats to be brought before me at Portland in said County of Multnomah, State of Oregon, at 10 o'clock A. M.; also caused to appear at the same time and place Herman R. Biersdorf, competent physician, proceeded to examine the said George Moats, and find as follows:

That the true name of the person named in the said complaint and petition is George Moats; age 33 years; nativity, Illinois; present residence Portland, and the cause of such insanity, unknown (Where the same can be ascertained), and that Herman R. Biersdorf, competent physician, after careful examination has certified on oath that the said George Moats is insane, and that one person is necessary to convey said George Moats to the Oregon State Insane Asylum at Salem. (Note.—Sheriffs in sending for attendants will please give name of patient and sex.)

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, That the said George Moats, is an insane person, and that he be conveyed to the Oregon State Insane Asylum at Salem, and there placed in charge of the officers having the aforesaid

asylum in charge, as provided by statute, and that one person is necessary to safely convey said George Moats, an insane person to said asylum.

(Here follows blanks for filling in payments for care of the patient, left blank in this case).

T. J. CLEETON,

County Judge.

Note.—In case the County Judge determines that the person committed or his or her parents, children, or guardian are unable to pay the State for the maintenance of such person as provided by Section 4440 of Lord's Oregon Laws, during the time he or she is an inmate of the Oregon State Insane Asylum, that part of the foregoing form of order relating thereto should be ruled out.—Secretary of State.

STATE OF OREGON,

County of Multnomah—ss.

I, \_\_\_\_\_, Sheriff of Multnomah County, State of Oregon, do hereby certify that owing to the \_\_\_\_\_ of the County Judge by reason of \_\_\_\_\_, I notified \_\_\_\_\_, Justice of the Peace in and for \_\_\_\_\_ Precinct, this County and State, to act in place of said County Judge.

\_\_\_\_\_  
Sheriff.

Note.—The above certificate to be filled out in case of the sickness of the County Judge, or his inability to act from any cause (Section 4435, Lord's Oregon Laws).



*In the County Court of the State of Oregon for the  
County of Multnomah.*

In the Matter of the Examination and Commitment  
of George Moats, An Insane Person.

CERTIFICATE OF EXAMINING PHYSICIAN.  
STATE OF OREGON,  
County of Multnomah—ss.

Herman R. Biersdorf, being first duly sworn, depose and say that I am a graduate of medicine and have practiced my profession 15 years from the date of April 1st, 1896, diploma; that at the request and in the presence of Honorable T. J. Cleeton, Judge of said County, Multnomah, has carefully examined George Moats in reference to the charge of insanity and do find that he is insane and by reason of said insanity and that one person is required to convey said insane person to the Oregon State Insane Asylum at Salem, and place him in charge of the officers of said institution.

The facts elicited by said examination are set forth in answer to the following questions:

(Note.—The examining physician will please answer the following questions as fully as they can, as this certificate affords all the reliable information in regard to the previous history of the patient that the Superintendent of the Asylum can obtain.

1. Patient's name? George Moats.
2. Residence? Summerville, Oregon.
3. Place of birth? Ill.

4. Occupation? Farmer.
5. Height? 5-9.
6. Weight? 160.
7. Color of hair? Dark.
8. Color of eyes? Brown.
9. Age? 33.
10. Race? White.
11. Education? Fair.
12. Religion? None.
13. Number of children living and number dead?  
One.
14. Age when first child was born? 8 years.
15. Age of youngest child? 8 years.
16. Any deformed or defective children? No.
17. How long in Oregon? 9 yrs. How long in U.  
S.? Always.  
(Then follow questions for those of foreign birth).
18. Name and birthplace of father? Albert Moats,  
Ohio.
19. Name and birthplace of mother? Sarah  
Moats, Ill.
20. Cause of death of father? Living.
21. Cause of death of mother? Living.
22. What relatives have been insane, epileptic, de-  
fective or criminal? None.
23. Habits of parents? Good.
24. Is parent married or single? Married.
25. Patient's habits? No history.
26. Is patient suicidal or homicidal? No.
27. Number of attacks? .....

28. Give details of previous attacks? .....
29. Assign cause of attacks? Not known.
30. Earliest symptoms noted and mode of development? Cannot get history.
31. Sleep? Fair.
32. Memory? Fair.
33. Headache or neuralgia? No.
34. Delusions, character of; are they fixed or changeable? Changeable.
35. Hallucinations and illusions, whether of sight, hearing, taste or smell? Sight and hearing.
36. Is patient noisy, restless, destructive or depressed? Very restless.
37. Brief history of diseases or injuries? Cannot get history.  
(Questions 38, 39, 40 pertain to women patients).
41. Natural temperament and mental capacity? Fair.
42. Is there loss or increased knee jerk, visual or pupillary defects? Loss of knee jerk.
43. Has patient or parents had syphilis? No.
44. To what extent has patient used alcohol, opium or tobacco? None.
45. Are there bruises, scars or other evidence of present injury? Bruises over stomach and right side.
46. Has patient been exposed to any contagion? No.
47. Have there been any convulsive seizures? No.
48. Give history with dates of previous "strokes"

or paralysis? None.

49. What treatment has been employed? Has been in Mountain View Hospital 10 days.

50. Additional remarks .....

51. Names and addresses of relatives, guardian or friends to be notified in case of death, sickness or discharge from Asylum? Albert Moats, Mt. Erie, Ill., Wayne Co.

52. Name and address of person who will furnish clothing and other necessary articles? .....

HERMAN R. BIERSDORF,

M. D.

.....M. D.

Subscribed and sworn to before me this 18th day of April, 1912.

T. J. CLEETON,

County Judge.

["Endorsed,"]: Filed Apr. 18, 1911.

F. S. FIELDS,

Clerk.

By M. L. O'Brien, Deputy.

STATE OF OREGON,

County of Multnomah—ss.

No. 7780.

I, F. S. Fields, County Clerk and Clerk of the County Court of the County of Multnomah and State of Oregon, do hereby certify that the foregoing copy of Insane Commitment of George Moats has been compared by me with the original, and that it is a correct

transcript therefrom, and of the whole of such original Insane Commitment as the same appears on file and of record in my office and in my custody.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 29th day of Mar. A. D., 1912.

[Seal.]

F. S. FIELD,

County Clerk.

.....Deputy.

STATE OF OREGON,

County of Multnomah—ss.

I, T. J. Cleeton, Judge of the County Court in and for the County of Multnomah, State of Oregon, do hereby certify that F. S. Fields, whose genuine signature is annexed to the above certificate, was, at the date thereof, the Clerk of the County Court of Multnomah County, aforesaid; that the official acts and doings of said Clerk are entitled to full faith and credit and that the above attestation is in due form of law and made by the proper officer.

AND I DO FURTHER CERTIFY that there is no presiding judge, chief justice, or presiding magistrate of said court, and that the same has but one judge.

Given under my hand and seal of said court this 17th day of May, A. D., 1912.

T. J. CLEETON,

Judge of the County Court, of the State of Oregon,  
for the County of Multnomah.



## STATE OF OREGON,

County of Multnomah—ss.

I, F. S. Fields, Clerk of the County Court of Multnomah County, for the State of Oregon, of which T. J. Cleeton, above named, is Judge, HEREBY CERTIFY that T. J. Cleeton whose name is subscribed to the foregoing certificate, was, at the time of making the same, a Judge of said Court and duly elected and qualified as such, and that I am well acquainted with the handwriting of said Judge, and that his signature to the same is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 17th day of May, A. D., 1912.

[Seal.]

F. S. FIELDS,

Clerk of the County Court for the County of Multnomah, State of Oregon.

Mr. MONTGOMERY: We now desire to offer in evidence certified copies of the records of the county Court of the State of Oregon, for the County of Marion, in each of these cases, prepared and certified to by R. D. Allen, Clerk of the County Court, by Mabel Gremmels, deputy, certifying to the signature of Judge Bushey, showing the proceedings with reference to the commitment of George S. Moats to the Oregon State Insane Asylum on the 7th day of June, 1911, and ask that the same be received in evidence and marked Defendant's Exhibit.

Mr. COCHRAN: Same objection.

Marked "Defendant's Exhibit D." And thereupon

said Exhibit D, of which the following is a copy, was received in evidence.

(Mr. MONTGOMERY):

*In the County Court of the State of Oregon for the  
County of Marion.*

IN THE MATTER OF THE EXAMINATION  
AND COMMITMENT OF GEORGE S.  
MOATS, An Insane Person.

COMPLAINT.

To the Hon. W. M. Bushey, County Judge of said  
County:

The undersigned petitioner respectfully represents and shows to your honor that she is a householder of Union County; that Geo. S. Moats is an insane person, and by reason of insanity is unsafe to be at large and is a proper subject for confinement in the Insane Asylum of this State.

WHEREFORE, your petitioner pray that you cause said Geo. S. Moats to be brought before you, at such place as you may direct, and due inquiry made as prescribed by law concerning the matters alleged in this petition.

IDA MOATS.

STATE OF OREGON,

County of Marion—ss. -----

Ida Moats, the petitioner above named, being first duly sworn, severally say that the foregoing petition is true, as I verily believe.

IDA MOATS.

Subscribed and sworn to before me this 7 day of June, A. D., 1911.

[Seal.]

R. D. ALLEN.

BE IT REMEMBERED, That at a regular term of the County Court of the State of Oregon for the County of Marion, begun and held at the Court House in said County and State, on the 8 day of June, A. D., 1911, when were present: The Honorable W. M. Bushey, Judge, presiding; R. D. Allen, Clerk; H. P. Minto, Sheriff; John H. McNary, District Attorney.

Whereupon, on the 8 day of June, A. D., 1911, the following proceedings were then had to wit:

In the Matter of the Examination and Commitment of George S. Moats, an Insane Person.

#### ORDER OF COMMITMENT.

By virtue of a complaint and petition filed in the above-entitled matter, I this day caused the said George S. Moats to be brought before me at Salem, in said County of Marion, State of Oregon, at 10 o'clock A. M.; also caused to appear at the same time and place A. E. Tamiesie, competent physician....., proceeded to examine the said George S. Moats, and find as follows: That the true name of the person named in the said complaint and petition is George S. Moats; age 33 years; nativity Ill; present residence Summerville, Oreg., and the cause of such insanity religious excitement (Where the same can be ascertained.) and that A. E. Tamiesie, competent physician, after careful examination ha..... certified on oath that the said George S. Moats is insane, and that

..... person..... necessary to convey said George S. Moats to the Oregon State Insane Asylum at Salem. (Note.—Sheriffs in sending for attendants will please give name of patient and sex.)

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, That the said George S. Moats, is an insane person, and that..... he be conveyed to the Oregon State Insane Asylum at Salem, and there placed in charge of the officers having the aforesaid Asylum in charge, as provided by statute, and that..... person..... necessary to safely convey said George S. Moats, an insane person to said asylum.

And it further appearing that (a)..... resident..... of (b)..... the (c) ..... of said ..... an insane person, ..... financially able and ha..... the ability to pay the State of Oregon for the maintenance of the said..... during the time..... he is an inmate of the Oregon State Insane Asylum.

IT IS THEREFORE FURTHER CONSIDERED, ORDERED AND ADJUDGED, That (a)....., resident of (b)..... shall pay the Treasurer of the State of Oregon, on or before the first day of January and July of each year, for the maintenance of said ..... the sum of \$10.00 per month, or pro rata for any less period, during the time the aforesaid person is an inmate of said Asylum, in accordance

with the provisions of Section 4440 of Lord's Oregon Laws. (a) Insert name or names of person, parent, children or guardian charged with maintenance. (b) Insert postoffice address of person or persons charged. (c) Insert whether parent, children or guardian.

W. M. BUSHEY,

County Judge.

Note.—In case the County Judge determines that the person committed or his or her parents, children, or guardian are unable to pay the State for the maintenance of such person as provided by Section 4440 of Lord's Oregon Laws, during the time he or she is an inmate of the Oregon State Insane Asylum, that part of the foregoing form of order relating thereto should be ruled out.—Secretry of State.

*In the County Court of the State of Oregon for the  
County of Marion.*

IN THE MATTER OF THE EXAMINATION  
AND COMMITMENT OF GEORGE S.  
MOATS, an Insane Person.

CERTIFICATE OF EXAMINING PHYSICIAN.  
STATE OF OREGON,

County of Marion—ss.

A. E. Tamiesie and .....  
being first duly sworn, depose and say that I am  
graduate of medicine and have practiced my profes-  
sion ten years from the date of .....  
diploma; that at the request and in the presence of  
Honorable W. M. Bushey, Judge of said County, A.



T. Tamiesie has carefully examined George S. Moats in reference to the charge of insanity and do find that he is insane and by reason of insanity and that ..... person..... required to convey said insane person to the Oregon State Insane Asylum at Salem, and place him in charge of the officers of said institution.

The facts elicited by said examination are set forth in answer to the following questions:

(Note.—) The examining physicians will please answer the following questions as fully as they can, as this certificate affords all the reliable information in regard to the previous history of the patient that the Superintendent of the Asylum can obtain.

1. Patient's name? George S. Moats.
2. Residence? Summerville, Oregon.
3. Place of birth? Ill.
4. Occupation? Farmer.
5. Height? 5-9.
6. Weight? 160.
7. Color of hair? Dark.
8. Color of eyes? Brown.
9. Age? 33.
10. Race? White.
11. Education? C. S.
12. Religion? None.
13. Number of children, living and number dead?  
One.
14. Age when first child was born? .....
15. Age of youngest child? 8.

16. Any deformed or defective children? No.

17. How long in Oregon? 9 years. How long in U. S.? Native.

(Here follow questions for patients of foreign birth).

18. Name and birthplace of father? Albert Moats.

19. Name and birthplace of mother? Sarah Moats. Ill.

20. Cause of death of father? Living.

21. Cause of death of mother? Living.

22. What relatives have been insane, epileptic, defective or criminal? None.

23. Habits of parents? Good.

24. Is patient married or single? Married.

25. Patient's habits? Good.

26. Is patient suicidal or homicidal. Perhaps suicidal.

27. Number of attacks? 2nd.

28. Give details of previous attacks? In asylum for one month, during April, 1911, mental condition as at present.

29. Assign cause of attack? Said to follow religious excitement.

30. Earliest symptoms noted and mode of development?

31. Sleep? Bad.

32. Memory? Good.

33. Headache or neuralgia? None.

34. Delusions, character of; are they fixed or

changeable? Yes, fear of death, depressed, suspicious and obsessed of various fears.

35. Hallucinations and illusions, whether of sight, hearing, taste or smell? Of sight and hearing.

36. Is patient noisy, restless, destructive or depressed? Depressed and restless.

37. Brief history of diseases or injuries. None.

(Questions 38, 39, 40 relate to women patients).

41. Natural temperament and mental capacity? Average mental capacity, nervous temperament.

42. Is there less or increased knee jerk, visual or pupillary defects? No.

43. Has patient or parents had syphilis? No.

44. To what extent has patient used alcohol, opium or tobacco? None.

45. Are there bruises, scars or other evidence of present injury? No.

46. Has patient been exposed to any contagion? No.

47. Have there been any convulsive seizures? No.

48. Give history with dates of previous "strokes" or paralysis? None.

49. What treatment has been employed? None.

50. Additional remarks? Patient returned by wife upon observing return of mental disturbance.

51. Names and addresses of relatives, guardian or friends to be notified in case of death, sickness or discharge from Asylum? Mrs. Geo. S. Moats, Summer-ville, Or.

52. Name and address of person who will furnish

clothing and other necessary articles? See 51.

A. E. TAMIESIE, M. D.

Subscribed and sworn to before me this 9 day of June, 1911.

[Seal.]

R. D. ALLEN,

County Clerk.

OREGON STATE INSANE ASYLUM.

Salem, Oregon, June 14, 1911.

To the County Judge of Marion County, Oregon:  
Sir:

Mr. George Moats who was admitted from your County June 11, 1911, died at this institution June 14, 1911.

Very respectfully,

R. E. LEE STEINER,

Superintendent.

STATE OF OREGON,

County of Marion—ss.

No. 833.

I, R. D. Allen, County Clerk for the County of Marion, State of Oregon and Clerk of the County Court for said County and State, do hereby certify that the foregoing Transcript of Commitment of Geo. S. Moats to O. S. I. A. has been by me compared with the original, and that it is a true and correct copy of said original commitment of Geo. S. Moats to O. S. I. A. and of the whole thereof, as the same appears of record in my office and custody.

WITNESS, my hand and seal of said court, this

29th day of March, 1912.

R. D. ALLEN,

Clerk,

By Mabel Gremmels, Deputy.

STATE OF OREGON,

County of Marion—ss.

I, William Galloway, Judge of the Circuit Court in and for the County of Marion, State of Oregon, DO HEREBY CERTIFY that R. D. Allen, whose genuine signature is annexed to the above certificate, was, at the date thereof, the Clerk of the County Court of Marion County, aforesaid; that the official acts and doings of said Clerk are entitled to full faith and credit, and that the above attestation is in due form of law, and made by the proper officer.

AND I DO FURTHER CERTIFY that there is no presiding judge, Chief Justice or presiding magistrate of said court, and that the same is composed of two judges, all of whom exercise co-equal and co-ordinate powers and jurisdiction.

Given under my hand and the seal of said Court this 29th day of April, A. D., 1912.

[Seal.]

WM. GALLOWAY,

Judge of the Circuit Court of Marion County, Oregon.

STATE OF OREGON,

County of Marion—ss.

I, R. D. Allen, Clerk of the Circuit Court of Marion County, for the State of Oregon, of which William Galloway above named, is Judge, HEREBY CERTI-



FY that said court is a court of record; that William Galloway, whose name is subscribed to the foregoing certificate, was, at the time of making the same, a judge of said court, and duly elected and qualified as such, and that I am well acquainted with the handwriting of said Judge, and that his signature to the same is genuine.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court this 29th day of April, A. D., 1912.

[Seal.]

R. D. ALLEN,

Clerk of the Circuit Court of the County of Marion,  
State of Oregon.

By Mabel A. Welborn, Deputy.

STATE OF OREGON,

County of Marion—ss.

I, W. M. Bushey, Judge of the County Court in and for the County of Marion, State of Oregon, do hereby certify that R. D. Allen, whose genuine signature is annexed to the above certificate, was, at the date thereof, the clerk of the county Court of Marion County, aforesaid; that the official acts and doings of said clerk are entitled to full faith and credit, and that the above attestation is in due form of law, and made by the proper officer.

AND I DO FURTHER CERTIFY that there is no presiding judge, chief justice or presiding magistrate of the County Court of the State of Oregon for the County of Marion and that the same has but one judge.

Given under my hand and the seal of said Court this 18th day of May, A. D., 1912.

W. M. BUSHEY,

Judge of the County Court Marion County, State of Oregon.

STATE OF OREGON,

County of Marion—ss.

I, R. D. Allen, Clerk of the County Court of Marion County, for the State of Oregon, of which W. M. Bushey, above named is judge, HEREBY CERTIFY that W. M. Bushey, whose name is subscribed to the foregoing certificate, was, at the time of making the same, judge of the County Court of Marion County, for the State of Oregon, and duly elected and qualified as such, and that I am well acquainted with the hand writing of said judge and that his signature to the same is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 18th day of May, A. D., 1912.

]Seal.]

R. D. ALLEN,

Clerk of the County Court for the County of Marion, State of Oregon.

By S. Z. Cilver, Deputy.

GEORGE BALDWIN, a witness called on behalf of the defendant, being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. Where do you reside, Mr. Baldwin?

A. Portland.

Q. In what line of activity are you at present engaged?

A. Acting as a nurse at the Mountain View Sanitarium.

COURT: Speak louder.

A. I am a nurse at the Mountain View Sanitarium.

Q. In what line of business were you engaged during the months of March, April and May, 1911?

A. I was working at the sanitarium.

Q. Were you ever acquainted with George Scott Moats, deceased, of Summerville, Oregon?

A. At the sanitarium only.

Q. State the conditions and circumstances under which you first became acquainted with Mr. Moats.

A. Why, Mr. Moats came there on the 21st day of March, 1911.

Q. Just speak a little louder.

A. Mr. Moats came to the sanitarium on the 21st day of March, 1911, or thereabouts.

Q. For what purpose did Mr. Moats come to the sanitarium?

Mr. COCHRAN: Objected to as immaterial, and the witness is not qualified to state, and hearsay.

Q. I withdraw the question. State, Mr. Baldwin, in detail the general physical and mental condition of Mr. Moats at the time he came to the Mountain View—I withdraw that question. Did you, Mr. Baldwin, act as an attendant to Mr. Moats while at the Mountain View Sanitarium?

A. Why, I was one of them. There was two of us taking care of him.

Q. During how long a period of time, and to what extent, did you attend Mr. Moats?

A. The first time he was there, about six days. Of course, I was around him part of the time, and took care of him part of the time.

Q. Now, state to the jury, Mr. Baldwin, the general physical and mental condition of Mr. Moats at the time—at the first time he came to the Mountain View Sanitarium, giving in detail his own statements made to you, if any, with reference to his general condition.

Mr. COCHRAN: Objected to as incompetent, immaterial and irrelevant. Possibly some of that question would be competent. Some of it, I think, is not, because the witness is not qualified to state.

COURT: He can describe in general the condition. He is not giving an opinion as to the ailment. If he was a nurse, he knows the condition, and can detail it.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

A. Why, Mr. Moats was in a very nervous state when he came there and very restless. Didn't sleep very much, and said he came there as he was afraid he might become violent, and also for treatment too. He never had hurt any one, but he didn't know but he might possibly—said he was possessed of an evil spirit, claimed that the Devil was after him most of the time. At times said that he was all right—other

times why, he had this evil spirit. He talked on religious matters most of the time. That seemed to be his——

Q. A little louder.

A. He talked of religion most of the time and so—and he said that he had written a letter to his people back east previous to his coming there, that the world was coming to an end, he thought. He didn't say what time—but I have forgotten now—and that he must rectify that by writing back again that he didn't think it was. Otherwise from that he was just about the same during the six days he was there the first time.

Q. Now, Mr. Baldwin, on what date did Mr. Moats come to the Mountain View Sanitarium the second time?

A. On the 11th day of April, 1911.

COURT: May I understand—how long did he remain the first time?

A. Why, he came on the 21st of March and left on the 27th.

COURT: Then he returned on what date?

A. On the 11th day of April.

Q. State to the Court and jury the general physical and mental condition of Mr. Moats at the time of his second confinement to the Mountain View Sanitarium, giving in detail his conversations and statements to you, if any, concerning his physical condition.

Mr. COCHRAN: Objected to as incompetent, immaterial and irrelevant, and the witness is not qualified.



Objected overruled. Exception saved.

COURT: Exception allowed.

A. Why, the second time he came, he seemed worse than he was the first time—quite a bit. About the time he came in—before he came in the institution, he stayed on the outside, I should think, about 20 minutes, and wouldn't talk to any one, nor wouldn't come in. I asked him why he stayed out there so long. He said he was fighting off the Devil. Kind of got quieted down after that and was quite rational and himself for a couple of days, and then he became worse again, and he commenced crying and praying, and talking very loud, you know, and saying that the world was coming to an end in eleven days. And he read his Bible a good deal of the time.

Q. During the period of his confinement to the sanitarium, and your association with him, did you see any external evidences of physical injury?

A. I did not. He was very perfect physically, I should think.

Q. Now, Mr. Baldwin, based upon—how long a period of time have you been a nurse?

A. About five years.

Q. Based upon your general experience as a nurse and as attendant, and more particularly your observations with reference to the physical and mental condition of Mr. Moats during the periods of his confinement to the Mountain View Sanitarium, of which you have spoken, what is your opinion with reference to

the question of whether or not Mr. Moats was at that time sane or insane?

Mr. COCHRAN: We object to that as incompetent, immaterial and irrelevant, not fixing the liability, or tending to defeat one, because the witness is not qualified to answer.

COURT: I think it is a competent question. He was an attendant, familiar with this man and associated with him there in the sanitarium for a time, and I think he is competent to state, giving his reasons, whether he was insane at that time or not.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

A. At the time he came there? I should think he was at the time he came there by his talk and his actions. He asked to be put in restraint for fear he might harm some one, and he also asked us how many nurses was there. In case he became unbalanced, he thought he would be hard to manage, and he asked to be put in restraint so he would not harm any one. He asked this himself.

Q. Will you please repeat that last answer?

A. He asked to be put in restraint the first night he was there, because he was afraid he might become violent and hurt some one. He said he was a very strong man physically, and he didn't want to do any one any harm.

JUROR: Was that the first time or the second time?

A. That was the first time—the first day that he came.

Cross Examination.

(Questions by Mr. COCHRAN):

Q. How long have you lived in Portland?

A. I have been around there off and on for five years.

Q. Where did you come from there?

A. I came from Vermont—is my native home.

Q. Vermont?

A. Yes, sir.

Q. In the employ of the Mountain View Sanitarium for five years?

A. No, sir, I have been there—I have been there—worked a year, nearly a year and five months. I was away four months, and been there two months the second time.

Q. How long have you been a nurse?

A. About five years.

Q. Where did you pursue a course of study, or under direction of any person?

A. No, just practical—always around mental diseases.

Q. Beg pardon?

A. I always worked around mental people.

Q. Always worked around mental people?

A. Yes, mental people.

Q. I suppose you mean by that that your nursing has been institutions where mental cases were treated?

A. Yes, sir.

Q. Mr. Moats, you say, was a very perfect speci-

men of physical manhood?

A. He looked to be, yes, sir; seemed to be perfect physically.

Q. His eyes were clear?

A. Yes, they were pretty clear, but kind of wild stare to them.

Q. His expression was normal, was it?

A. His eyes?

Q. Well, his general facial expression?

A. Yes, I think it was, with the exception of his eyes. That seemed—well, seemed to have kind of a wild stare to them. ....

Q. When he first came there?

A. Yes, sir.

Q. Did you give him any physical tests of any kind?

A. No, sir.

Q. All you do around there is simply take care of the patients, and do as the doctors tell you, is it?

A. Yes that is what we do.

Q. Haven't any initiative of your own around there?

A. No, sir.

Q. And you don't prescribe anything?

A. No, sir.

Q. Did you make a record of those things you have been testifying to?

A. No, sir.

Q. Sir?

A. No, sir, just took from his saying, is all.

Q. Do you keep what you call attendant's notes there?

A. No, sir, not of him, only the day he came and the day he went away, **each time**.

Q. Didn't keep any records of your observation, then?

A. No, sir.

Q. So you could report them to the physician in charge?

A. Not any record—only just reported them as he asked us questions about the patients.

Q. So you just simply related on recollection?

A. Yes, sir.

Q. How many patients did you have there?

A. Why, varied from fifteen to twenty—sometimes twenty-five.

Q. How many did you attend?

A. Well, two of us attended about, probably eight or ten men. I don't know exactly how many we had at that time. We used to average about ten or twelve men there. There was always two male attendants to take care of them.

Q. Two male attendants to take care of eight or ten patients?

A. Yes, sir.

Q. Were they mental cases?

A. Most all of them.

Q. Are you real sure you haven't attributed to Mr. Moats some statements you heard others say?

A. I feel pretty positive I have not.



Q. All you have related is on your recollection?

A. Yes.

Q. What did the others say?

A. Well, I don't remember about these.

Q. You don't remember about that, do you?

A. I probably, if I——

Q. Just explain to the jury how it happens you don't remember them, and remember in a positive way what Mr. Moats said?

A. Well, he was a man that voluntarily told all of his trouble, it seems like.

Q. The other fellows didn't say a word then? Is that the way you remember?

A. Usually, unless you request them.

Q. Are you prepared to tell this jury the other eight or ten mental cases you had at the Mountain View Sanitarium, were people who didn't talk?

A. Yes, some of them talked very much; in fact, they all talked.

Q. They did?

A. Yes.

Q. But you can't remember what they said, and you do remember what Moats said?

A. Yes, I remember what Moats said.

Q. Is that the way you want the jury to understand? Now, what particular thing has happened that caused you to remember what Moats said, and don't remember what the other fellows said?

A. Why, I suppose I might remember what lots of them said if I——

Q. Had been sufficiently urged?

Mr. PLATT: We suggest that counsel let witness finish his answers, and not break in on him.

A. Of course the—scarcely any two mental cases that are alike. Hardly ever seem exactly alike.

Q. That has been your observation, has it?

A. Yes, it has.

Q. That is your explanation, is it, to the jury why you remember what Mr. Moats said, and don't remember the others?

A. I don't remember very much what the others said—so many different ones there.

Re-Direct Examination.

Mr. MONTGOMERY: Just one question. I want to ask permission of court and counsel to ask a question I omitted on direct examination.

Mr. COCHRAN: No objection.

Q. Did Mr. Moats, while at the Mountain View Sanitarium, say anything to you with reference to insurance?

A. He said he had his life insured some time before he came there.

Re-Cross Examination.

Q. When did he speak to you about having his life insured—about the fact of its being insured?

A. The first day he came.

Q. The first day he came?

A. Yes, sir.

Q. Was the purpose, can you say whether or not

the purpose was so in case of his demise, his attendant would know about it, so as to inform his relatives?

A. I don't know about that.

Q. Nothing said about it?

A. No, sir, there was not.

Witness excused.

DR. GEORGE W. ZIMMERMAN, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. In what line of activity are you at present engaged?

A. Osteopathic physician.

Q. Where do you reside, Doctor?

A. La Grande, Oregon.

Q. In what line of activity were you engaged during the spring of 1911?

A. Same thing.

Q. At the same place?

A. Yes, sir.

Q. You are regularly admitted to practice? In the state of Oregon?

A. Yes, sir.

Q. Were you ever at any time acquainted with George Scott Moats, of Summerville, Oregon?

A. Yes, sir.

Q. When did you first become acquainted with him?

A. On or about December 20, 1910.

Q. Did Mr. Moats at any time during the spring of 1911 consult you with reference to his physical and mental condition?

A. He did.

Q. On what date, do you remember approximately?

A. March 18, 1911.

Q. What, if anything, did Mr. Moats state to you at that time?

A. Well, he said to me that he was very nervous, couldn't sleep, and wanted a general physical examination to see if I could find any cause for sleeplessness—for his nervousness.

Q. Did his wife accompany him at that time?

A. She did.

Q. What, doctor, was your diagnosis of his case at that interview?

A. Well, he was suffering from a very severe mental strain and commonly called neurasthenia.

Q. What, if anything, did you advise Mr. Moats?

A. I advised him to try the osteopathic treatments.

Q. What is the purpose, Doctor, of these treatments?

Mr. COCHRAN: We object to that as immaterial, your Honor.

COURT: I suppose it is competent, if it is for the purpose of showing that it was intended to relieve him from the trouble he was suffering from—to that

extent it is competent.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

A. The treatments were for the purpose of relieving him from his nervousness, principally; to get him so he could rest at night.

Q. Did you observe about Mr. Moats any external evidences of physical injury which produced this nervous condition?

A. According to our standards as osteopaths, was a fit subject for nervousness through his contracted condition—contraction of his muscles.

Q. Would you say, Doctor, that the condition in which you found him was produced by any sudden cause, or was it a condition of growth?

Mr. COCHRAN: I object to that as immaterial and incompetent, and the witness is not qualified.

COURT: I think he is competent, he is a regular practicing physician. From his standpoint he has a right to testify.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

A. What is the question?

Q. (Read).

A. I would say a condition of growth lasting over a considerable period of time.

#### Cross Examination.

(Questions by Mr. COCHRAN):

Q. Doctor, as an osteopath, what studies did you follow, in the treating of nervous diseases?



A. Well, we studied the nervous system, studied nervous and mental diseases.

Q. What author?

A. Church and Peterson.

Q. For how long a time did you study nervous diseases?

A. 27 months; that is, in a period of three years, of nine months each.

Q. You studied the nervous system from the beginning then, did you?

A. Yes, sir.

Q. What school did you graduate from?

A. Los Angeles College of Osteopathy.

Q. Does that follow the parent system of Dr. Still of Kirksville, Missouri?

A. Yes, sir, the basic principles are all the same.

Q. Now, the first time you had seen Mr. Moats as an osteopathic physician was on the 18th of March, 1911?

A. Yes, sir.

Q. What time of day was it he came in there?

A. About, I should judge about five o'clock. My book that I keep for that purpose says that he was treated at 5:30 P. M.

Q. Mrs. Moats you say came in with him?

A. Yes, sir.

Q. Now, what was said there at the time in the presence of Mrs. Moats?

A. Well, I couldn't give it to you just as given, because quite a time had elapsed between my examin-

ing him and the time of his demise, so that the matter was not brought to my attention and I was unable to give any correct verbatim statement of what was said. But I know he told me about being nervous, about being unable to sleep, and he asked me if I would examine him and tell him if I could do him any good or give him any help.

Q. By this course of osteopathic treatment you told him that you could give him help?

A. I told him that I would try to help him.

Q. Now then, from Mr. Moats' viewpoint himself, and not from yours, isn't it a fact that he regarded this being unable to sleep as due to merely local cause and was not organic in any respect?

A. I don't remember what he said the cause might be or whether he gave any cause for it. I think he left that to me, to find the cause.

Q. Did you inquire of him what he had been doing?

A. I did.

Q. Did you weigh him to see whether he had lost in weight?

A. No, sir, I asked him if he had.

Q. What did he say?

A. He said that he thought he was losing weight getting thinner.

Q. He thought he was?

A. Yes, sir.

Q. And do you know what his weight was—what he said it was?

A. I don't remember, no. One of the questions that I ask most all patients of that nature is what their standing weight is, but I don't recall what his answer was, now.

Q. And you don't know how long he had been losing sleep from what was said there?

A. He had been losing sleep for several months, was what he told me.

Q. He told you then he had been losing sleep for several months?

A. Yes, sir.

Q. And to what extent?

A. Well, I don't know as he made anything specific about it.

Q. What did he say about his appetite?

A. I don't remember what he said about that.

Q. Did you ask him?

A. I expect I did. I usually do.

Q. But you don't remember now what he said about that?

A. I do not.

Q. Now, in what way did you examine Mr. Moats?

A. Physically.

Q. In what way?

A. According to our osteopathic teachings.

Q. What are your osteopathic teachings.

A. To make a physical examination.

Q. Now, we come back to the beginning. Tell the jury in what way you make that physical examina-

tion—the manner or method?

A. We use our hands and our instruments for making a physical examination, just the same as any physician would do. There is practically no difference in our examination, with the exception that we do make more of an examination of the spine, I believe, than the common run of physicians do, but we examine the heart, liver, lungs, kidneys, make—where we have it or have a chance—make a chemical urinalysis, which I don't believe I did in this case, but I examined his heart, his lungs, his liver—asked him about his kidneys.

Q. Did you count his heart-beats?

A. I did.

Q. Count his respirations?

A. I did.

Q. What were they—normal?

A. I don't remember any more, just what they were, but I don't think they were or I wouldn't have said what I did.

Q. Don't you remember now, whether they were normal or otherwise?

A. I don't. I haven't any recollection just what they were.

Q. Assuming, Doctor, that they were normal on the 16th of March, what have you to say as to whether they were normal on the 18th?

A. According to what I would think would be his actual condition. If he was extremely nervous or in a nervous condition, his heart beat might be down

twenty or up twenty, I don't recall just what it was.

Q. But you are unable to tell the jury at this time what his condition was with reference to his heart on the 18th of March, then?

A. No, sir, I don't recollect.

Q. Did you take the blood pressure?

A. No, sir.

Q. Do you ever do that in your osteopathic treatment?

A. If it is necessary.

Q. Do you do it generally?

A. No.

Q. Do you have the instruments there in your office—

A. No, sir.

Q. —to take the blood pressure?

A. No, sir.

Q. Now, from what facts do you base your statement to the jury, that he was suffering from a very severe nervousness?

A. On the condition in which I found him upon examination. He had an anxious expression in his face; he was—his condition as to his nervousness was visible even to other persons who wouldn't have any learning or teaching along the line of a physician. He was worried; he wouldn't sit still; he seemed to be wanting to move all the time from place to place.

Q. You observed him for a certain length of time, did you?

A. I observed him for probably thirty minutes.



Q. In what way?

A. While I was examining him.

Q. While on your table?

A. Part of the time on the table, part of the time while I was taking his history, part of the time while he was on the stool.

Q. What was he worried about?

A. I couldn't tell you. He didn't tell me. I couldn't find out.

Q. You didn't ask him?

A. I did ask him.

Q. Ask him if he was worried about anything?

A. I asked him if he had any trouble that was worrying him. He didn't know, was about the answer I got, if I recollect.

Q. He said he didn't know?

A. No, he hadn'a any trouble.

Q. Was that the only time you saw him?

A. That was the last time I saw him.

Q. Professionally?

A. Yes, sir.

Q. And during that whole time he was in your office, was about how long?

A. I am unable to say just when they came in, in the first place. I was busy at the time, and when his time came for an examination, I examined him.

Q. Now, you spoke about the contraction of his muscles. What muscles was it that were contracted?

A. The muscles of his entire back—of his neck.

Q. The muscles of his back and his neck were con-

tracted?

A. Yes, sir.

Q. When a muscle contracts, does it show knots?

A. Not necessarily, no, sir.

Q. Did it give evidence of pain?

A. It may.

Q. Did it in this instance?

A. I don't recollect whether it did or not.

Q. Did he complain of any pain of the muscles of the entire back?

A. He complained of the muscles of the neck hurting him, worse than his back.

Q. He complained of the muscles of his neck, did he?

A. Yes, sir.

Q. While you were examining him, or before?

A. While I was examining him.

Q. Wasn't that due to your pressure on them?

A. Not necessarily.

Q. Now, you osteopaths get your hands on the back of a patient and press pretty firmly, don't you?

A. No, sir.

Q. Enough to make them flinch?

A. It may be if it is sore, that it would make them flinch.

Q. Wouldn't it make them flinch in certain portions of the back whether sore or not?

A. No, sir.

Q. Doesn't it as a rule? Don't they flinch?

A. No, sir.

Q. Were those muscles contracted so as to—of the back—so as to show, be visible to the eye?

A. Probably not to yours; they were to mine, your eye not being educated like mine is to see those or observe those things.

Q. Well, if one can see, that is the requisite, isn't it?

A. No, sir.

Q. You don't feel them——

A. Yes, sir.

Q. —with your eye, of course.

A. You don't feel them with your eye, it is true, but you feel them with your fingers.

Q. Did you see the contractions in the muscles of his back?

A. I don't remember now whether I did or not, it is too long ago.

Q. Did you have him stripped so that you could, by manual treatment, get right next to his skin?

A. Yes, sir.

Q. And you don't remember now whether you saw any contraction or not?

A. I couldn't say.

Q. What was the effect of this contraction that you didn't see there upon this man's nerves?

A. If I may be allowed to say, that our fingers take the place of our eyes, so that I felt what even I may not be able to see, and the effect was pressure on the nerves, which would cause irritation of the nervous system, and bring about a nervous condition.

Q. You didn't find any of his spine unjointed, did you?

A. No, sir, I didn't look for that.

Q. The osteopaths have discarded that?

A. Never have had it, sir.

Q. Never had it?

A. No, sir. To unjoint a spine, means death.

Re-Direct Examination.

(Questions by Mr. PLATT):

Q. Did you give him any warning as to his condition?

A. I believe I made the statement that he must have help, whether he got it from me or wherever he got it. If not, there were just three endings to his condition, two endings to his condition, and one of them was to become insane, and the other one was to die.

Re-Cross Examination.

Q. Did you say that in the presence of Mrs. Moats?

A. I did.

Q. When? Before or after?

A. When he was through the treatment; when he was through his examination.

Q. That was to encourage him to get help, was it?

A. From some place, yes, sir.

Q. Now, do you want to take the position, do you take the position that because Mr. Moats was a little nervous, said that he couldn't sleep, that you could,

by feeling his back and the muscles of his neck, determine to a certainty that the man was either going to die or go insane?

A. I might say that I had warning of Mr. Moats—

Q. Well, I am asking a question, and I wish you would answer.

Mr. PLATT: I would like to have the witness finish the answer.

COURT: He can answer counsel's question. He started in, as I understand him, to state something which he had heard, which would be hearsay of course—what some one told him.

A. I can't make an answer to your question without that.

Q. Now, you knew as a matter of fact that he was going to die, didn't you?

A. No, sir, unless that he would die some time; yes, it is true.

Q. You weren't able to fix a date exactly, were you?

A. No, sir; no, sir.

Q. And the question of his insanity was the uncertain part?

A. Yes, sir.

Q. And you wouldn't presume to fix the date, and didn't fix the date?

A. No, sir.

Q. You knew, as a medical man, that if he lived long enough, he would eventually get Senile Dementia, didn't you?



A. Not necessarily.

Q. That would be the tendency, wouldn't it?

A. We have people who die that are not insane—do not have Senile Insanity.

Q. That is a very prevalent disease in very old people, isn't it?

A. Well, it is when they get extremely old, yes.

Witness excused.

DR. JAMES W. LOUGHLIN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. In what line of activity are you at present engaged?

A. Practicing medicine as a physician and surgeon.

Q. At what place, Doctor?

A. La Grande, Oregon.

Q. Were you a physician and surgeon at La Grande, Oregon, during the spring of 1911?

A. I was.

Q. You are regularly licensed to practice in the State of Oregon?

A. I am.

Q. And were at that time?

A. I did.

Q. Were you ever acquainted with George Scott Moats of Summerville, Oregon?

A. I was.

Q. When did you first meet him, Doctor?

A. March 16, 1911.

Q. What was the occasion of your meeting him at that time ?

A. He came in to consult me about his condition.

Q. At what time of the day, Doctor?

A. I should say it was in the neighborhood of ten o'clock. Somewheres between ten and eleven.

Q. In the ——

A. Forenoon.

Q. Now, state, Doctor, the result of that conversation, giving the statements, if any, made by Mr. Moats himself concerning his condition, and your diagnosis of the case.

A. You want it just as I found him that morning?

Q. Yes.

A. Well, Mr. Moats came in and his wife was with him, and he told me that he was suffering from sleeplessness, couldn't sleep very well, and that he was nervous, and that he didn't feel good generally. I examined him, I looked him over, and found that his physical condition appeared to be all right, didn't find anything wrong with the physical condition and so I asked him questions and I discovered then—that is, I recognized then, that the man was in a highly nervous condition, and I began to question him about his nervous condition, and from his questioning—from my questioning I got from him that there had been a religious revival in Summerville, and he had

taken an active part in it, and that he was unduly excited along those lines, and I followed along the conversation with him, and questioned him on other things, and found that the man was all right; you could carry along a conversation with him on any other subject. I talked to him about his farming and his crops, and what he was going to do there this year; he said he didn't intend to do anything, that the boys were going to have the place; and the man appeared all right except for this religious excitement. Well, I recognized then, that the man was unduly excited, nervous, and I recommended—well, in the meantime, I encouraged him as much as I could, told him about this condition he was in, that he didn't want to worry about it, that he would be all right, and I talked to him along these lines, and then I advised him—advised his wife to take a trip to Portland, it would be a good thing for him to get away for awhile, go down to the sanitarium down at Portland; and they didn't think favorably of it at that time, but they said that they would be in again if he wasn't better, and I gave him a prescription, a nerve sedative, and advised him to keep away from religious work and keep as quiet as possible. Advised him in fact to stay in La Grande for awhile, not go back to Summerville, and I left him—he left the office at that time and took the prescription with him. That was about—the first time I saw him, that was about as I found him, and what I advised him to do, and the way I treated him.

Q. Now, Doctor, did your examination disclose any physical injury which might be the cause of this nervousness?

A. No.

Q. What has been the extent of your experience and education, Doctor, with reference to the subject of nervous diseases?

A. Well, I had a course in nervous diseases when I graduated, which all medical students get; then I have had a chance to observe them in Blackwell's Island; and I have also had a chance to take some lectures under Dr. McDonald in nervous diseases, and also Dr. Hammond, a man in New York—I followed up that work.

Q. Did Mr. Moats consult you at any time subsequent to the 16th day of March?

A. Yes, I was called afterwards.

Q. State the times of that?

A. Well, I think it was Sunday night, I had been out in the country, and I got in about half past two in the morning, and my wife told me——

Mr. COCHRAN: Just omit that, of course, Doctor, we object.

A. Well, I was called at half past two when I left my house to go to the Savoy Hotel to see Mr. Moats.

Q. In La Grande?

A. In La Grande. I got to the hotel and I went to the room, and I found Mr. Moats, there, and a Mr. Gilliland, a Methodist minister, and Mrs. Moats. Mr.

Moats was very glad to see me, and he told me, he says: "I haven't been able to sleep any," and, he says, "I am in bad shape," and he says, "I want you to do something for me." I sat down and talked with him, and encouraged him as much as I could, and told him that he would be all right, and he said something to the effect then—I think it was then—that he thought he would go away the next day; wanted me to take him away, later in that day; and I sent to the drug store for a sedative powder and gave it to him and left him, and went home, and later in the day I saw him again.

Q. What was the approximate date of this last consultation, Doctor?

A. The last consultation?

Q. Yes.

A. It was the morning of the 20th, early in the morning.

Q. You mean in your answer March 20, 1911?

A. Sir?

Q. What month was that? You said the 20th.

A. 20th of March.

Q. What year?

A. 1911.

Q. Now, Doctor, what was his comparative condition between the two consultations?

A. Well, when I found him that Sunday night, his condition was much worse than it was when I saw him four days before.

Q. When were you called again?



A. Well, he came into my office I think that same day, and that evening we talked—planned over about him going to Portland to Dr. Williamson's sanitarium, and that evening he and I took the train, the 11:15 train for Portland.

Q. How did he behave on the train?

A. Well, he was restless, and didn't sleep any to speak of, but he was quiet enough, I could talk with him, persuade him.

Q. Did you take him to the sanitarium?

A. Yes, I took him first to Dr. Williamson's office, and then from there we went out to the sanitarium.

Q. What statements, if any, did Mr. Moats make to you at that time regarding his condition?

A. Well, Mr. Moats' condition was, he was in that nervous condition that he imagined that the Devil was speaking to him—that was his principal trouble—and wanted him to do something that he didn't want to do, and Mr. Moats didn't want to—as he told me—he said: "I don't want to hurt any one, and I think it would be better," he says, "If I stay away a little while." He seemed to realize his condition and realized the danger it might be to his family and those around him, if he remained at home, but it was the Devil trying to have a bad influence over him, was his principal thought.

Q. Now, Doctor, based upon those observations concerning Mr. Moats' condition at these respective dates to which you have testified, would you be of

the opinion that the nervous condition in which you found him was produced by any sudden cause, or was it a condition of growth?

A. Well, if you will allow me to qualify my answer there, explain why I answer that a little differently—that is, I wouldn't like to say yes or no to that question right then, but from what later developed.

Q. Answer it in your own way.

A. Well, of course, a patient will come to you with that form of excitement, not exactly that form of excitement, but some people with nervous temperament will come in to you who have been through some great strain, or through some revival, and have taken an active part in it, and it has had that effect on them. They are upset nervously, they are not of stable nervous makeup and are easily upset, and with them, the condition will gradually—you send them away for a little rest and change of scene, why, those patients—the case will clear up, but there will always be more or less of the neurasthenic disposition; not what you call insane person, but with the insane conditions going on the while. These symptoms came on before, and with what later revealed, I should say that the condition was a form of dementia at that time.

#### Cross Examination.

(Questions by Mr. COCHRAN):

Q. What is the fact, Doctor, as to whether or not patients that come to physicians generally, and to yourself in particular, and complain of being unable to sleep, are suffering from serious nervous or mental diseases?

A. Well, they are not unless you were—you wouldn't consider they were suffering from serious mental diseases.

Q. The rule is, they are not?

A. Well, the first supposition—you see a patient, you do not consider they are insane the first time you see them—the first interview with them.

Q. Observing from the viewpoint of the physician that you were in on the 16th of March, you are unable to say, are you not, that Mr. Moats was at that time suffering from a serious nervous and mental disorder?

A. I would not have been able to say at that time?

Q. Yes.

A. At that time I couldn't have——

Q. Not taking in consideration what you know.

A. I know. At that time I couldn't have positively stated that Mr. Moats was insane.

Q. And the appearances at that time were that he was suffering from slight excitement due to his church work, and would speedily recover?

A. Well, I wouldn't say the excitement was very slight. At that time I considered that his condition was—in fact I wasn't satisfied in my own mind just what his condition was. There were certain things about his condition that suggested there might be serious trouble, and there were other things that suggested it was something that would pass away.

Q. It was a matter that you couldn't determine whether it was really serious or slight at the time?

A. No, not at that time, I couldn't.

Q. And from Mr. Moats' viewpoint it had the appearance to him after he had been encouraged by you to the belief that it was a slight disorder, that it would speedily disappear?

A. I encouraged him in that belief.

Q. He went away with that belief?

A. He went away with that belief.

Witness excused.

DR. CHARLES HENRY UPTON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. In what line of activity are you at present engaged, Doctor?

A. Practice of medicine and surgery.

Q. At what place?

A. La Grande, Oregon.

Q. In what line and in what place were you engaged during the year 1911?

A. The same.

Q. Were you ever acquainted with George Scott Moats of Summerville, Oregon?

A. Yes, sir.

Q. State the circumstances, Doctor, of your first meeting with Mr. Moats.

A. I first met him something like three or four years ago. I don't just recall the date. It wasn't, however, for himself.

Q. Did you meet him at any time during the

spring of 1911?

A. Yes, sir.

Q. State the occasion of that meeting, and its approximate date, Doctor.

A. It was some time during the early part of the year, I must explain that I haven't any date because I gave him no prescription, and under those conditions I don't make any record of the consultations if the account is paid, and they paid, but it was some time during the early part of 1911, he came in and—

Q. Prior to March?

A. Beg pardon?

Q. Prior to March?

A. I guess so, although of that I wouldn't be positive. I don't mean to make that guess because of conditions that have developed at all, but it was some time during the early part of the year He complained of nervousness and sleeplessness. I examined him—advised him to go to a lower altitude, and to consult a physician there.

Q. What statements, if any, did Mr. Moats make to you at that time concerning his condition?

A. I don't recall any outside of his explaining that he was unable to sleep and more or less nervous.

Q. What, doctor, was your diagnosis of his case?

A. I considered it a case of neurasthenia.

Q. Explain to the jury, Doctor, what that is.

A. That is nervous exhaustion, nervous depravity, over-worked nerves, considering the recuperative power of the nervous system.



Q. And did your examination disclose any physical reason as a cause of this nervous condition?

A. Physically sound, apparently.

Q. In your opinion, the nervous condition in which you found Mr. Moats at that time, was it of any sudden or immediate origin, or a disease of growth?

A. More than likely it was a disease of growth. I would consider it such.

Q. What, Doctor, has been the extent of your education and experience with reference to the subject of nervous diseases?

A. My college work in Chicago, as well as post graduate work at the same place.

Q. And to what extent have you had experience in that line?

A. I have had various occasions the last ten years and in Chicago had quite a little eclectic work.

Q. Now, Doctor, if it should appear that a patient on the 16th day of March, of a given year, had consulted a doctor with reference to nervousness and sleeplessness and his case had been diagnosed as neurasthenia; and it further appeared that on the third of March of that year, and likewise on the 14th, he had consulted a physician with reference to a similar disease; and it further appeared that subsequent to that date and on or about the 18th of March, he had made a statement to another physician that this nervousness was of a long standing, covering a long period of time; and it further appeared that shortly subsequent to the 18th of March of that year, he went to a sani-

tarium for treatment for this nervous disease; and it further appeared that on or about the 10th of April of the same year, he was committed to an insane asylum, and that subsequently on or about the 4th of June of the same year, he was again committed to an insane asylum, and during this period of commitment was suffering from manic depressive insanity, and subsequently, and on or about the 14th of June of the same year, died as a result of manic depressive insanity, what would be your opinion with reference to the fact of whether or not the nervous disease from which he was suffering on the 16th of March of that year, was the incipient insanity from which he died?

Mr. COCHRAN: I object to that question as not being based upon the evidence in the case, including in it some statements not shown by the evidence.

COURT: What particular statements?

Mr. COCHRAN: I have in mind that there is no proof, as I recall it, that he died of manic depressive insanity.

COURT: I understand that was in the proof of death. As I recall the evidence is in the record covering every item in the question. I may be mistaken, but unless it is pointed out that it isn't, the objection will be overruled. You may answer the question, Doctor.

A. I would have considered it to have been the incipient stage.

Cross Examination.

(Questions by Mr. COCHRAN):

Q. You are quite unable to say, Doctor, just when

it was that Mr. Moats came in to see you?

A. No, I couldn't give you the date.

Q. You don't know whether before or after the 16th of March?

A. I could not be real positive about it, but as my impression was lead back to it by being asked a date, I tried to obtain some supporting testimony, or some supporting memorandum I had, and was unable to give the exact date.

Q. You don't know when Mr. Moats was taken to Portland?

A. In fact, I didn't know he was taken to Portland, and didn't know that he was dead, until that—until the summer time.

Q. So he was just in your office the once?

A. Yes, sir.

Q. Mrs. Moats was with him?

A. Yes, sir.

Q. Was that the time that you removed the growth from his eye?

A. He may have been there before. I hadn't remembered that I had removed something from his eye, but probably I did.

Q. You don't remember that?

A. I don't think I did at that time.

Q. I mean the eye-lid.

A. I understand. I don't think I did at that time.

Q. You don't remember whether it was that time?

A. No, I couldn't be sure about it. I have no memorandum about it. Whenever a person pays his account, I don't keep a record of his being there unless I

give him a prescription. I keep copies of my prescriptions.

Q. Did you talk with Mr. Moats at that time?

A. Yes, sir.

Q. And he told you that he was unable to sleep?

A. Complained of sleeplessness.

Q. You encouraged him that the matter was—would readily yield to treatment?

A. No, I didn't. I told him to go to the coast, a lower altitude, and there get a physician to take care of him.

Q. Did you examine him physically?

A. Yes, sir, went over his abdomen and his general condition—found him to be in good condition.

Q. Found him physically sound in that respect?

A. Apparently.

Q. Found no organic lesions?

A. No organic trouble; no show of pathological condition.

Q. No pathological condition?

A. Not that I could determine, except nervousness.

Q. You didn't ascertain the extent of that, did you?

A. Of the nervousness?

Q. Yes.

A. Only that it was quite well developed in a neurasthenic line.

Q. Did you ascertain to what extent or what the cause was of his neurasthenia? You say he was a neurasthenic.

A. I couldn't elicit any cause; couldn't get any definite cause.

Q. Couldn't determine any definite cause?

A. Couldn't get any definite cause.

Q. Now, neurasthenia is a general name which physicians have to designate a multitude of things, isn't it?

A. Not a multitude of conditions, no, sir. It designates just exactly what the name says, an asthenic condition of the nervous system.

Q. What does that mean?

A. That means without sufficient nourishment to keep it up to normal conditions.

Q. In other words, it might be due to over-work?

A. It might be due to over-work, exhaustion, depravity in any manner.

Q. Not necessarily serious in any respect?

A. May not be. -----

Q. If a man is following a sedentary life, working on the inside, and does not take much exercise, he may get that?

A. More apt to have it.

Q. A man out on the farm, he may get it by working hard on his farm, and keeping long hours?

A. Worrying, yes.

Q. Worrying, incident to the business?

A. Yes, sir.

Q. None of it is necessarily serious?

A. Might not be, not necessarily. That is right.

Q. You encouraged Mr. Moats, did you?



A. Encouraged him? I don't believe I ever failed to encourage any of them any more than I direct them to do something that in my judgment would benefit them.

Q. Now, the discussion there, at the time—Mr. Moats regarded the matter as of slight moment and would readily yield, I suppose, to treatment?

A. I don't recall that I gave him any impression as to the length of time for recovery, as I considered it one in which change of altitude would have a marked impression on him, as well as change of association, surrounding, and general conditions.

Mr. PLATT: I didn't catch the last of it.

A. Change of associations, surroundings, and general conditions.

Q. That is a marked change for the better?

A. I expected it to be.

Q. Now then, you found in Mr. Moats no functional or organic trouble at all?

A. No organic lesion. I don't recall the condition of the pulse, but from his nervous condition I would have expected it to be accelerated, more rapid than normal.

Q. But you don't recall whether it was or not?

A. I couldn't be positive of it; that is, have no memorandum of it.

Q. If he was examined physically on the 16th of March, and his pulse was found to be normal and his lungs sound, and his abdomen sound, no condition—no abnormal condition—that could be seen with the

eye, and he complained of no pain, would you expect to find him a man that was suffering from disease, under these conditions?

A. You haven't gone over the field that would be necessary to determine it by. The nervous system, of course, would have to be included; an examination of the reflexes would be a very important feature.

Q. Well, I understand that the examination was made and that the reflexes were normal.

A. Reflexes normal, then I would expect him to be in a normal condition.

Q. The examination of his urine shows that to be normal—no albumen, no sugar. Would that be a further evidence of the normal condition of the man?

A. It certainly would.

Q. Would you expect to find a man in that condition and have the muscles of his back contracted in any way?

A. I wouldn't, not with the reflexes normal.

Q. Would the muscles of his back under those conditions be contracted so as to cause any pressure on the nervous system?

A. Could they, did I understand?

Q. Would they, as a rule?

A. The sensory nerves of the one that supply them most particularly; possibly.

Q. If a man was—later developed a mental condition which required him to be confined in the asylum, isn't it possible that such condition might spring up after the 16th of March?

A. Oh yes, yes, mania can occur in a very short time; may become a raving maniac inside of 24 hours, without any previous lesion noticable.

Q. And the fact that he was confined in the insane asylum on the 18th of April, in the lower altitude of Portland, in a sanitarium, wouldn't necessarily be positive proof that any maniacal condition existed earlier?

A. Not at all.

Q. I understand it then, that the condition in which Mr. Moats was as related by Mr. Montgomery's hypothetical question—that it would be possible for that maniacal condition——

A. He traced a nervous condition from the beginning. He traced a nervous condition from the beginning of his question to the finish, and that could easily have been the condition.

Q. But, on the other hand, there might not have been any physical connection between the maniacal condition existing, or the delusional condition existing on the 18th of April with any previous disease.

A. Would necessarily have been reflexes.

Q. (Read).

A. That is right.

Q. Now then, if a person has complained of sleeplessness, that doesn't necessarily indicate they are suffering from any serious disorder?

A. Not alone. That alone does not necessarily indicate that. He may have had a bad stomach to cause sleeplessness.

Q. There are many diseases——

A. Yes, many.

Q. —that are brought to you for treatment and you don't expect to find anything that will cause you to believe a man is insane just because he has a little sleeplessness?

A. Not necessarily, but we usually look upon the nervous system generally; whenever a person complains of sleeplessness, if we find no organic lesions, that is, no functional derangement or organic lesion, we look upon it then as being the beginning of insanity, we look upon it more seriously.

Q. In cases of neurasthenia you usually find organic lesions?

A. Not necessarily.

Q. Do you generally?

A. No, sir. Well, I won't say that, it may be found and it may not. I don't know how the proportion would average up.

Q. But as a rule you think that would be the case?

A. Not necessarily so, although it could be. I would expect it might be true, but we wouldn't necessarily find it so. However, we find a very great many neurasthenics that apparently have no organic lesions, that go about without treatment for years.

Q. Now, Doctor, suppose that Mr. Moats was examined on the 16th of March, 1911, and at that time was found to be sound both physically and mentally, as far as one could discover upon a thorough examination, and afterwards he went to Portland, was there

treated at a hospital and later on in April was taken to the asylum, was taken to the asylum on the 18th of April, and was discharged as cured on the second of May, and again committed to the asylum on the 7th of June, and died on the 14th of June of maniacal exhaustion, is it not possible under that state of facts for the manical condition to have begun, developed, and culminated subsequent to March 16, 1911?

A. Yes, sir.

Re-Direct Examination.

Q. Now, Doctor, wasn't the manic insanity formerly classified under another heading?

A. Under another heading?

Q. Yes.

A. Yes, sir, but it may have had its origin under any one.

Q. I know, but I mean, didn't it go formerly under the name of recurring insanity?

A. Recurring insanity, yes, sir; recurring insanity.

Q. Isn't it a fact that evidence of an apparently temporary cure is one of the very evidences of this form of insanity?

A. Yes, sir.

Mr. COCHRAN: Rather leading and suggestive, if your Honor please.

COURT: He has answered the question—he has said “yes.”

Q. Now, Doctor, you said in your cross examination that it was possible for insanity to develop in a very short period of time. Now, I will ask you if it



isn't a fact that, in the absence of evidence of any very sudden shock, or of physical injury, in most, if not all such cases, an examination of the previous history will disclose some symptoms of nervousness?

A. Yes, sir.

Re-Cross Examination.

Q. By sudden shock or physical injury, what would you include?

A. Any injury. Any nervous surprise, exhaustion—well, any nervous surprise, any surprise, whether it be pleasant, or grief, or some other feature.

Q. Suppose he was put in restraint at a hospital against his will?

A. That is all right.

Q. That would affect it?

A. Yes, sir.

Q. And if that condition of affairs existed, you would be inclined, would you not, to attach a great deal of importance to that fact as a symptom, would you not?

A. I certainly would.

Witness excused.

Mr. MONTGOMERY: I now desire to offer in evidence, in each of these cases, a certified copy of the record of the Oregon State Insane Asylum, prepared and certified to by Dr. R. E. Lee Steiner, Medical Superintendent of the Oregon State Insane Asylum, and keeper of these records, and also prepared and certified to by Oswald West, Ben W. Olcott, and Thomas B. Kay, respectively the Governor, Secretary

of State, and Treasurer of the State of Oregon, and ex-officio trustees of the Oregon State Insane Asylum, and also whose genuine signatures are certified to over the hand of Ben W. Olcott, Secretary of State, and the great seal of the State of Oregon, showing the record of the condition of George S. Moats while at the Oregon State Insane Asylum, and ask that the same be received in evidence and marked as Defendant's Exhibit.

Mr. COCHRAN: We object to the document as immaterial, incompetent and irrelevant, and not a record required by law to be kept under the provisions in the statute with reference to certified copies, and in that respect the document would be heresay.

COURT: What is it—a mere copy of the entries showing the record?

Mr. MONTGOMERY: A memorandum of the entries upon the books, the official records which are authorized to be kept by the statute. I think the statute provides that the medical superintendent, as I recall it, is the custodian of the records of the Oregon State Insane Asylum.

Mr. COCHRAN: My recollection is that such documents are just like the records of private hospitals. The physician may require the nurse to keep the record of a hospital and of the administration of medicine for his own information, but it is not a legal record.

COURT: You may submit it for the present, and

look it up later. It will be admitted, subject to the objection.

Marked "Defendant's Exhibit E" for identification.

Whereupon proceedings were adjourned until 2 P. M.

Pendleton, Oregon, Tuesday, May 28, 1912, 2 P. M.

H. P. LEWIS. Recalled by the defense.

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. Mr. Lewis, I hand you these two policies of insurance, Plaintiff's Exhibits 1 and 2, and ask you to look at them and state to the jury whether you had anything to do with the delivery of them?

Mr. COCHRAN: Objected to as immaterial, there being nothing in the pleadings, predicating any question upon the matter of delivery.

COURT: It is admitted they were delivered, but it may be important in another view of the case. He may answer the question. The objection will be overruled.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

A. Yes, sir.

Q. State what you did in that regard.

A. When the policies came I went to a phone, and—what we call our rural phone, and phoned down to Moats' home to know if I should hold the policies until he came to town, or should I mail them. The answer——

Q. Do you remember when that was?

A. That was April 6th.

Q. 1911?

A. Yes.

Q. Go on.

A. And I mailed the policies.

Q. Were those the instructions you received on the phone?

A. Yes, sir.

Witness excused.

DR. CHARLES HENRY UPTON. Recalled by defendant.

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. Doctor, did Mrs. Moats during the year, the spring of 1911, consult you with reference to the fact as to whether or not George Scott Moats was an insurable risk?

Mr. COCHRAN: We object to the question as immaterial and irrelevant.

COURT: Well, there is a charge that she knew of this alleged fraud, and I suppose it is for the purpose of hearing upon that allegation in the answer that this evidence is offered, so I suppose it is competent for that purpose.

A. Something was said relative to it, but I don't remember the date that that was said.

Q. What was the character of the question and your answer to it?

A. I don't know as I could give you the detail of the question, or anything in detail about it, but there was something said about his being insurable, or something about as to his being eligible to insurabil-

ity, or something of that sort, and I made some remark relative to his nervous condition, and gave them a negative answer.

Cross Examination

(Questions by Mr. COCHRAN):

Q. Where was that conversation had, Doctor?

A. It must have been in the office; there is not other place that I met them that I recall.

Q. At the office?

A. Yes, sir.

Q. Was it the same time that Mr. Moats was up there?

A. I couldn't be positive, but I rather think so, because that is about the only time I remember meeting Mr. Moats, although there was another time mentioned about my taking something from his eye. If I did it then, it must be the time. Now, I couldn't be positive as to the date.

Q. You don't know whether before or after March 16th?

A. Couldn't give you the date.

Q. You don't know how the conversation came up?

A. Relative to his examination. It must have been at the last examination.

Q. But you are not clear whether it was or not?

A. Well, I would rather expect it to be or such a question wouldn't have come up. I am not sure, but judging from analogy I would expect it.

Q. Were you talking about insurance?



A. They were talking.

Q. And she happened to inquire if her husband was an insurable risk or not?

A. Talking about his nervous condition, and there was something said about insurability.

Q. Just what it was you don't remember?

A. Well, the purport, not definitely.

Q. And you don't remember what your answer was at that time?

A. Only I remember it was negative more than affirmative.

Q. There at your office, and who was present, you say?

A. Mrs. Moats was the only one in the office with him.

Q. Just Mrs. Moats and Mr. Moats?

A. Yes, sir.

Witness excused.

DR. W. T. WILLIAMSON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. What line of activity are you at present engaged in, Doctor?

A. Physician.

Q. How long have you been a physician?

A. Since 1877.

Q. You reside at —

A. Portland, Oregon.

Q. Have you specialized in any particular branch?

A. I have.

Q. What branch, Doctor?

A. During the last 26 years I have limited my practice to nervous and mental diseases.

Q. Now, kindly state to the jury the extent of your education and experience, with reference to the subject of nervous diseases, giving in detail—nervous or mental diseases, giving in detail the various schools if any, from which you graduated, and the extent of your experience.

A. I was graduated from the Medical Department of the University of California, where we had the superintendent of one of the asylums in California holding the chair of mental and nervous diseases, and who gave us clinics in addition to his lectures upon that subject. Then I had what ordinarily occurs to the practice of the general physician for eight years in my general practice; then I was 17 years first assistant physician at the Oregon State Insane Asylum; and I also took a post graduate course in the New York Polyclinic, where I studied along the same lines, and since leaving the insane asylum ten years ago, I have been conducting two sanitariums in which patients of this class—or these classes, are being treated.

Q. What are the names of those sanitariums and where are they located?

A. The Mountain View Sanitarium and the Waverly Sanitarium, at Portland, Oregon.

Q. Were you ever acquainted with George Scott Moats, deceased, during his life time?

A. I was.

Q. State the circumstances under which you first met Mr. Moats.

A. At the Mountain View Sanatorium.

Q. Now, state in detail the conversation, if any, which you had with Mr. Moats, during his confinement to this sanitarium, and your diagnosis of his case at that particular time.

A. Well, I will be unable to give the conversation verbatim, I could give you substantially such parts as I remember. The first interview I had with him, I spoke to him at considerable length, and he told me of his condition.

Q. Do you remember approximately the date of that, Doctor?

A. It was the day that he was brought to the sanitarium. It was—I believe it was March 21, 1911. He was there twice, six days the first time, and then he came back April 11th, and remained about seven days. He told me about his inability to sleep, and about his being troubled with hallucinations and illusions. He had a belief that his spirit would leave his body and go out into the world, or had done so, had gone out, and would return to him, and he also had a belief that the Devil was accompanying him and had been for some time, not continuously, but frequently, and that the Devil, would whisper words to him, tell him to do things, and there was a constant

fight being maintained by him against the Devil to resist these advices, or intreaties, or whatever they were, and he realized that at times he had been unable to control himself as against that influence; made that apparent by suggesting to me that he wished to be restrained at night for fear that under this influence he would be incited to the commission of some overt act which he did not wish to do. He talked coherently, expressed himself clearly enough, and had a fairly intelligent knowledge of events upon which he could discourse, but when he approached the line of his delusions, he lost control, and was conscious that he had lost control at times, and was very much worried about it, and consequently he was in a state of tension. His countenance was anxious and troubled, and at times fearful. He seemed to feel that he was a victim of something that he could not control and which he was very anxious to control. He could be reasoned with up to a certain point, following it in accord, until after the final termination theoretically of what was being said, he would come back with the idea, well, that he could not help believing that it was true. He could reason out that it was not true, yet the feeling which came from his perverted condition impelled him to believe that it was true. That was the mental state in which I first found him.

Q. What if anything, did he say, Doctor, with reference to the prior history of these delusions—prior to the date when you first met him?

A. He spoke about their having existed previous-

ly, but I could not say precisely as to the time.

Q. Could you approximate?

A. It seems to me like it was weeks, or months. I wouldn't be sure, something of that kind, and the nervous trouble with the insomnia, had existed still longer, but there was, as I recall it, an increasing development of the symptoms, in the frequency of the approach to him and in their intensity.

Q. Now, Doctor, isn't it a fact that delusions in themselves are as much evidence of insanity as manic insanity itself?

A. They are, yes.

Q. If it should appear, Doctor, that on the 16th day of March of a given year, a man was suffering from neurasthenia, and it further appeared that on the 3rd day of March of the same year, and on the 14th day of March of the same year that he had consulted physicians for nervousness and sleeplessness, and it further appeared that on the 18th of March of the same year, he had consulted a physician with reference to nervousness and sleeplessness, at which time he said that the nervousness had existed over a considerable period of time prior to that, and it further appeared that on the 21st of March of that year, he was confined to a sanitarium for this nervous disease, and that he was again confined on or about the 11th day of April of the same year, and that on or about the 18th day of April of the given year he was committed to the insane asylum where he was suffering from manic depressive insanity, and it further ap-



peared that on the 4th of June of the same year, he was again committed to the insane asylum suffering with manic depressive insanity, which insanity resulted in his death on the 14th of June of the given year, what would be your opinion, with reference to the fact as to whether or not the nervousness from which he was suffering on the 16th of March was the incipient form of the insanity from which he died?

Mr. COCHRAN: We object to that as immaterial and incompetent.

Objection overruled. Exception saved.

COURT: Exception is allowed.

A. That would be the probability.

Q. In your examination, Doctor, did you observe any evidence of physical injury which could have been the cause of this nervousness?

A. I did not.

Q. Based on your observation—on your study of this particular case, what is your opinion with reference to the fact of whether or not the nervousness from which he was suffering was of sudden origin or covered a long period of time?

A. Judging from his condition as I saw it, and the history he gave, I believe that it was not of sudden development, but had continued for some time.

Q. Now, Doctor, you have said that he was confined a second time at your sanitarium. What, if any, conversation with reference to his condition did you have with him at that second confinement?

A. Well, he could not control himself so well at that time in his speech. He was very excited and

the ability to control was lessened, or else the exciting manical state was greater, so that he did not have such good control. He developed some mania while there, and would call out and shout and struggle, and had to be restrained and resisted, fought strongly, and would throw himself, and when not restrained, he would struggle and strike himself against the walls or beds in a reckless, frenzied condition; then would subside again and he would be better. There was simply an increase of the morbid condition at the second appearance at the sanatorium.

Cross Examination.

(Questions by Mr. COCHRAN):

Q. How often would you see him a day, Doctor, while he was at the sanatorium?

A. Once, and not every day. I have a partner, Dr. Calbreath, sometimes he would see him, and sometimes I would see him.

Q. He was at your place the first time about six days, was he?

A. Yes, sir.

Q. And after the first conversation with him you saw him then about two or three times after that?

A. Yes, sir.

Q. And in describing his condition did you speak from your personal observation of him, or from the reports of your nurses?

A. Well, I think all, I have stated was within my own knowledge, and it was corroborated by the information I got from the nurses. Perhaps the descrip-

tion of his excited condition the second time was largely from the reports given by the nurses, although I spoke to him, saw him when he was in restraint, and was very much excited, and incoherent.

Q. His physical condition at that time on account of the restraint showed his body and arms to be somewhat bruised, did it not?

A. Yes, I think so.

Q. To what extent is that true?

A. Oh, I don't know—probably considerable; he struggled a great deal, and as I say, he was in that frenzied state. He had to go from the bed, you know, to the toilet, and for such other purposes, and had opportunities of struggling and throwing himself, and he would do that in a very reckless way, and would strike against the door, or against the bed, when lying in the bed, etc., and I suppose—I don't remember about how much he was bruised, but I am satisfied that he was bruised considerably.

Q. You saw him the first time about the 21st of March?

A. Yes.

Q. That is at your office, or at the sanitarium?

A. At the sanitarium.

Q. Did you see him at your office in the city?

A. Not that I recollect. He was brought to the office, but I was out at the time, as I remember it.

Q. And eventually was directed to be taken out to the sanitarium?

A. Yes, he saw Dr. Calbreath.

Q. Oh, he was your partner at the time?

A. Yes, in the office, that is my recollection.

Q. If a patient is merely suffering from sleeplessness, does that always indicate that he is suffering from a serious disease?

A. No. Of course it is not a very desirable condition, nor a healthy condition, but many persons suffer more or less from sleeplessness, for a great many years, and still keep on doing business, and filling their place in life.

Q. What is sleeplessness due to, generally? Where is it of the slight character spoken of?

A. It is due to a very great many different causes.

Q. Among which may be mentioned some of the more usual causes. Can you give us those

A. It may be from auto-intoxication, perhaps constipation of the bowels, and resultant absorption of toxic matter. It may be from some discomfort such as hemorrhoids, carious teeth, growths in the nose, or post nasal cavity, bladder trouble. In fact, any part of the body may, by being irritated in some degree, keep the brain in a state of unrest that would produce sleeplessness.

Q. In fact, sleeplessness, is one of the first things that happen as the result from most any usual, ordinary disease?

A. No, not unless the disease is accompanied by something that acts as an irritant or pain; such disease must be of a character that affects the brain, interfering with its circulation; theoretically, it is supposed that if the quantity of the blood in the brain is increased, producing what is termed a congestion,

that the ideation of the individual is increased, and he is wakeful.

Q. I suppose it is also due to over-eating sometimes, is it not?

A. Over-eating may well do it, yes.

Q. Over-work contributes to it also?

A. A person may become so fatigued that they cannot sleep,—either mentally or physically.

Q. So that sleeplessness, if one was consulting a physician, merely for sleeplessness, doesn't necessarily consult them for a serious physical or mental disorder?

A. No, when persons consult a physician for sleeplessness, it simply invites an examination into his condition to find out why he is sleepless, and if there is some discoverable condition or lesion in the body which may be the cause of it, they then direct the attention to curing that condition, and if this cannot be found, then the assumption is, that it is something central, relating to the central nervous system.

Q. Then from the patient's viewpoint in consulting the physician, thinking himself to have just sleeplessness due to some cause there, a patient takes the view that it is of a slight character, and of a temporary nature, unless it is accompanied by severe pain of some kind, do they not? Have I made myself clear?

A. I don't get the substance of that question.

Q. Assuming that a patient desiring to consult a physician is not suffering from any pain or known discomfort other than the fact of being unable to



sleep, from his viewpoint, can you say as to whether or not the impression that he would have would be that he was merely suffering from a temporary ailment rather than a serious, dangerous, disorder?

A. Do I believe that the patient would have that view?

Q. Yes.

A. I presume it is quite likely he might. One patient might think it was something quite serious, another would think it was something of very little consequence.

Q. Assuming, Doctor, that a person on the 3rd of March was in a doctor's office, and his wife was consulting a doctor for some nervous trouble, and in a casual way he should say to the doctor—inquiring how he was, and without any examination the doctor would say, “well, I advise you to take a rest,” and on the 16th of the month, the same month, he would consult a physician for sleeplessness, in which there was no pain connected with it—no inflammation or no appearance of physical unsoundness—and was examined that same date, and his heart was found to be normal, the circulation regular and normal, his lungs sound, his abdomen and the organs contained therein sound, and an analysis of his urine showed it to be sound—to be normal—and that on the 21st of the month he went to a sanitarium and there was treated for nervousness and sleeplessness, and was later confined in the asylum, and was there for a few days and was discharged as being cured, and later returned to the asylum, and after four or five days died of ex-

haustion due to maniacal depressive insanity, what, in your opinion—you may state whether or not in your opinion the cause of that insanity could have happened after March 16th?

A. Yes, it could have happened after March 16th, in the condition you have described.

Re-Direct Examination.

Q. What, Doctor, is recurring insanity?

A. It is a form of insanity characterized in a typical case by changing symptoms. The patient for a time may, be very much exalted or imaginative or excited, actively disturbed, with tendency to mania, or with mania present. This persists for a time, and perhaps be followed by an altogether changed condition in which the patient might become depressed, might become melancholy; that would perhaps last a shorter or a longer period of time, and then again be followed by lucidity, or apparent recovery. This order is not a necessary one; they might change around in any way, in their sequence, but it means simply a form of insanity, characterized by different symptoms in which recovery forms one of the features, and then a return later to one or more of the same symptoms.

Q. What relation, if any, exists between maniacal depressive insanity and recurring insanity?

A. Well, it is simply an elucidation or clearing up the classification of insanity. The first term was used to cover a larger class of cases, and it being more definite, laterly maniacal depressive insanity was cut out to express more definitely and clearly a portion

of the cases formerly included under the name of Circular insanity. It is just simply a sub-division of what was originally a broader term.

Q. Now, Doctor, in answer to the hypothetical question propounded by Mr. Cochran, you said that insanity could—or the insanity which caused the death of a patient in that hypothetical case could have originated subsequent to the first given date, I will ask you, Doctor, in the absence of any physical injury, or any sudden shock of some kind, what is your opinion as to the probability of its originating subsequent to that date?

A. Well, he gave me a hypothetical question with certain limitations, and you are giving me one with greater——

Q. I am referring now to the limitations of this hypothetical question. That is, as I understood the question, he asked if the patient was suffering merely from sleeplessness on the 16th of March, of a given year; now, the question I am asking you is whether or not, in the absence of a physical injury, or a sudden shock, the insanity which his question called for would probably have originated subsequent to the date of this sleeplessness

A. No, the assumption would be in a case of that kind that the sleeplessness or nervousness—I think that was included—with the earlier stages or stage of the condition, unless there was some discoverable *ca* subsequent to that time, produced the insanity.

Re-Cross Examination.

Q. Would that cause necessarily have to be a traumatic cause?

A. Not necessarily, no.

Q. In other words, it does not necessarily have to be a physical shock to the person

A. Not necessarily, no, sir.

Q. May have been purely mental?

A. Yes, mental causes on certain organizations may produce insanity.

Witness excused.

DR. A. E. TAMIESIE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. In what line of activity are you at present engaged, Doctor?

A. Physician at the Oregon State Insane Asylum.

Q. How long have you been an admitted and practicing physician, Doctor?

A. Since 1902.

Q. Kindly state to the jury, Doctor, the extent of your education, giving the schools from which you have graduated, and the extent of your experience, with reference to the study of nervous diseases, if any—nervous and mental diseases.

A. I was graduated from the medical department of the Willamette University in 1902; received the usual course of lectures at any medical school relative to

mental and nervous diseases, and in this particular school I had the good fortune of receiving lectures from an expert whose opinion on those subjects is seldom questioned, and the advantages of abundant clinical observation during this course of lectures covering a period of four years, which is the term in this school. I later took a post graduate course in Chicago, where I received instruction along the same line under eminent authorities of that city; and I also took additional instruction in the City of New York under some of the most eminent men in the City of New York. During my years of practice, I have constantly devoted my entire attention to the study of mental and nervous disorders.

Q. How long, Doctor, have you been with the Oregon State Insane Asylum?

A. Almost ten years.

Q. Were you acquainted with George Scott Moats, deceased, during his life time?

A. I was.

Q. Kindly state to the jury the occasion of your first meeting with Mr. Moats.

A. My first meeting with him was accidental. I chanced to be sojourning at the Hot Lake Sanitarium for two or three days, and left the sanitarium, stopped at La Grande, expecting to visit some friends, leaving La Grande the same evening. While at the station we discovered that our train was late, and while waiting I noticed Mr. Moats—I noticed a man who afterwards seemed to be a Mr. Moats—in the station with a young man and a young woman.



His peculiarity attracted my attention, and he, with his company and others, made an effort to board the first train that came through. We were unsuccessful in getting this train, were informed by the conductor that another train would soon be coming.

Q. Could you approximate the date of this?

A. It was, I think, in the early part of April. It was the day that he was taken to the sanitarium in Portland, the last time, now whatever that date may be—the second time. In due time it came along, and we boarded the train. This party occupied the same coach and a berth perhaps two sections ahead of the one that I occupied. I retired, as it was somewhat late—after one o'clock, I believe, and a good deal of talking was going on, and I wondered at the time why they didn't retire, and the conversations were rather continuous and somewhat annoying. I, at one time, thought I would call the porter and ask him if he would not —

Mr. COCHRAN: I object to what he thought in this case—it is quite immaterial.

COURT: You needn't tell what you said to the porter, Doctor, just tell what you observed from these people, and what you heard.

A. Their conversation—I couldn't understand and in the morning quite early I heard a voice coming from the same part of the car, saying that he desired to get up, addressing some one, I believe, by the name of Mary, and objection was raised by this party, and he replied saying he would rather be with Jesus Christ

than to be where he was. After hearing that conversation and connecting it with the actions of the man the previous evening, I assumed that he was perhaps being taken to an insane asylum, or an institution, I didn't know. In the morning I inquired of the young man who was with him who informed me where he was going, and I observed his conduct on the train all the way to Portland, and assisted them after they got to Portland, in the way of directing them to their car and to the sanitarium, where he was bound.

Q. What sanitarium was that, Doctor, do you know?

A. They were going to the sanitarium conducted by Dr. Williamson, as stated by the young man.

Q. Now state, Doctor, the occasion of your next meeting with Mr. Moats.

A. When he was admitted to the Oregon State Insane Asylum, I imagine some eight or ten days later.

Q. And now, Doctor, while at the insane asylum upon the occasion of his first commitment, was Mr. Moats under your care?

A. Yes, sir.

Q. Will you kindly state to the jury the entire history of his case as far as you can recall it, from the date of his commitment until he left, and did you make any record of your observation at that time?

A. Yes, sir.

Q. I will now hand you certain records purporting to be made by yourself and hand them to you merely for the purpose of refreshing your memory as

to the history of the transaction.

Mr. COCHRAN: I presume if the witness can state without refreshing——

COURT: He can use the memoranda if he needs them, to refresh his memory, if he made them at the time it occurred.

Q. Were these made at the time of the observation?

A. Yes, sir, that is a part of these records. This is the entire record of the case, and some of the records were subsequent.

Q. Just use whatever you need, Doctor, to refresh your memory with reference to your observations.

A. It appears from the commitment that he was admitted to the asylum on the 18th day of April. After his entrance to the asylum I visited him and proceeded to investigate his case both mentally and physically, and found him to be insane. He was then in a state of mental depression, entertained delusions; he appeared to be fearful of some oncoming disaster which he was unable to explain or account for, and would talk at considerable length, bearing upon this matter. He was very much self-centered and it was with difficulty that you could carry him away from these ideas; he would reply to your question, then perhaps come back with another, bearing on some of his religious delusions; he complained that he could not sleep, and was very restless. Objected to remaining in bed, and said he must die, and even fixed the date on several occasions—of his death, and on two occa-

sions requested very earnestly that we telegraph his wife to come; that he was to die at 12 o'clock on a certain date. He also felt oppression as far as his breathing was concerned; desired to sleep or remain by an open window, and I believe that he was changed to a different room on one or two occasions simply to satisfy him; he felt that sleeping near a window would perhaps sustain him—sustain life longer or make it more pleasant while he was dying. An examination of his physical state revealed nothing abnormal with the exception of a few bruises on his body, especially on the right side, and about the limbs, of which he made no complaint. The following day he seemed to become more restless and appeared to become more insane. The next two or three days were marked by improvement, and he continued to so improve. After a short time he was given permission to be about the grounds unguarded, and was employed at some work and seemed to be very happy and contented; talked about his past delusions and recognized the falsity of these abnormal ideas that he had, and was disposed to make light of them. In due time letters were addressed to his wife informing her of the progress in the case, and also informing her that we thought he would make a recovery and could probably go home soon. Upon the solicitation of the wife, he was permitted to go home a little earlier than we had anticipated, but was in good condition and was recorded on our records as having fully recovered his mental health at that time.

Q. What was the next occasion of your meeting

him, Doctor?

A. Some time after he was returned to the asylum by his wife, who came to the city for the purpose of consultation, I believe, rather than to place him in an insane asylum. We discussed the case in his presence and I advised her at that time that it might be that a change of environment might be good, and she finally concluded to take rooms in the town—in the City of Salem, and I was to advise her from time to time if he continued to do well. This plan did not meet with his approbation after he got away from my presence, as he was then in a state on indecision, was unable to decide for himself, and one moment desired to do a thing; the next moment he desired to do the opposite. I think she returned with him to the asylum. I advised her then to take him to the city hospital, just across the street, where it was a little more convenient, and he might be cared for there. She apparently was endeavoring not to return him to the insane asylum. He consented and proceeded to the hospital, didn't like the appearance of the place, and came back, or started to come back. She couldn't get him back to the asylum; he wanted to go to the hospital, and he did not want to go; he wished to go to the asylum, and he did not wish to do that. Finally he was brought into the asylum with considerable effort on his wife's part, and myself, together with the little boy, and advised that he had better come into the asylum quietly; if not, he would probably have to be taken to the county jail. He seemed to understand the undesirability of publicity, examination and con-



finement in the county jail. He was finally induced to enter the asylum and was committed after he entered the asylum. His condition of mind and physical health at that time was almost a re-duplication of what was observed the first time, with the exception that the symptoms appeared to be more intense. And he presented a condition of indecision that was much more manifest then than ever before, to my knowledge.

Q. Now, Doctor, will you give a detailed statement, if possible, of his condition during the period of his second commitment up to the time of his death?

A. The symptoms that I have already mentioned seemed to increase in intensity until he became quite maniacal and violent. He appeared to be in great fear of death, and felt that his family should be notified, and resisted every effort that was made by the physician and his attendants; he refused to take his food believing that it was being poisoned, or that it was useless to take food; he refused to stay in bed; he refused to stay in his room; refused to take the usual baths, and in fact, his whole existence was one of resistance with increasing intensity, until he became very noisy, very violent, had to be restrained, and given opiates to control. The day before his death I was at my cottage and was summoned by his nurse saying that she believed that Mr. Moats was dead. I hurried to the bedside of the deceased, and found him in a state of collapse—unconscious. After working with him for a time he seemed to rally and began to talk some and seemed to improve. I remained with

him until nearly midnight, along in the morning hours he became violent and destructive, and was very noisy again and was restrained. The next morning in making the usual visits to the ward, I was informed by his attendant that he had gotten along quite well, but had been noisy, and that he had, just a little time before I entered the ward, had taken nourishment. I made no effort to see him out of the regular order at that time. When I reached his room I found him in a state of collapse and said at the time that the man was dying, but finding him in a similar condition the night before, thought perhaps there was an opportunity to resuscitate him, but he died within fifteen minutes after I entered his room.

Q. Did he at any time, Doctor, make any attack upon the attendants?

A. Yes, on several occasions; he mis-identified those about him—thought several of them were the Devil or evil spirits, and on one occasion rushed out of his room and ran almost the full length of the walk, of the ward, and was returned to his room with great difficulty, requiring the assistance——

Mr. COCHRAN: Allow me to ask there, Doctor, if you please, did you see these things personally?

A. No.

Mr. COCHRAN: We ask the court to instruct the jury not to consider the testimony.

A. The last incident you have reference to?

Mr. COCHRAN: Yes.

A. Yes.

Q. Now, Doctor, based upon your observation of

his condition and the statements made to you by himself, what do you consider the cause of the condition in which you found him when he was first committed to the insane asylum?

A. That would be a difficult matter to state.

Q. What did he say to you with reference to the cause, if anything?

A. He realized that he was mentally disordered; referred to it on several occasions during the course of the examination and said that he had not slept well for a long time; that he had been very nervous, that he had been engaged in religious work and that he had become very active and thought that had something to do with his nervousness. He said that he was impressionable, and it seemed to prey on his mind more than it ever had before.

Q. What, Doctor, is recurring insanity?

A. Just what the name would indicate, it is a recurrent type of mental disturbance with periods of lucidity.

Q. What relation, if any, exists between recurrent insanity and the character of the insanity which caused the death of Mr. Moats?

A. They are quite similar. Recurring insanity is an older term that is used, or was used, to cover a broader field.

Q. Now, Doctor, if it appeared that on the 16th day of March in a given year, a man was suffering from nervousness and sleeplessness, and consulted a physician concerning it, and it further appeared that on the 3rd day of March of the same year, and like-

wise on the 14th day of March of the same year, he had consulted other physicians with reference to the nervousness and sleeplessness; and it further appeared that on the 18th day of March of the same year he consulted still other physicians with reference to nervousness and sleeplessness, at which time he said that the nervousness and sleeplessness had extended over a period of time long prior thereto, and it further appeared that on the 21st day of March of the same year he was committed to a sanitarium suffering from nervousness and sleeplessness; and it further appeared that on or about April 11th of the same year, he was again committed to the sanitarium suffering from nervousness and sleeplessness; and it further appeared that on or about the 18th of April of the same year, he was committed to an insane asylum suffering from manic depressive insanity; and it further appeared that on the 4th of June of the same year he was again committed to the insane asylum suffering from manic depressive insanity, which insanity resulted in his death on or about the 14th day of June, of the same year, what would be your opinion, as to whether or not the nervousness and sleeplessness from which he was suffering on the 16th day of March of the given year was the incipient form of the insanity which caused his death?

A. It is very probable that the symptoms noted at that time were the beginning of what later terminated in very active mental disturbance.

Q. In the absence of any evidence of physical injury or sudden shock, what is the most common form

of incipient insanity?

A. I would like to have the question repeated.

Question read as follows: "In the absence of any evidence of physical injury or sudden shock, what is the most common form of incipient insanity?" I might amplify that by saying in what form or by what disease is the incipient insanity most often evidenced?

A. Usually there is a disturbance of the emotions; there may be physical ill health; there may be sleeplessness; there may be irritability; there may be change of disposition; morbid spells or attacks; absent mindedness; mental confusion. These are some of the earlier manifestations of oncoming mental disease.

Q. To what extent is the disease known as neurasthenia evidence of incipient insanity?

A. It is a very common symptom of mental disorder.

#### Cross Examination.

(Questions by Mr. COCHRAN):

Q. Doctor, isn't it true that the word neurasthenia as directed to a condition of the patient is some times used rather loosely, and to designate a condition of the patient when you are unable to find anything else the matter with them?

A. That is possible and probable in some cases.

Q. The physical condition in which you observed Mr. Moats to be on the 18th day of April, or the 19th of April, when he was first committed to the Oregon Hospital, was that of being very badly bruised in and about the chest, wasn't it? He was very sore?



A. I recall no complaints of that kind from the patient. My attention was directed to this by his wife on one or two occasions. The examination revealed nothing of importance. There may have been one or two small blue marks on the body there, and those I have already mentioned, but none of consequence.

Q. Did you examine him on the 19th personally?

A. Yes, sir.

Q. I call your attention to the attendant's notes on the first commitment there under the date of the 19th; refresh your memory from those notes and state whether or not his chest was badly bruised, and that he was very sore.

A. Says, "there were heavy bruises under the ribs—blue spots—claims his ribs are sore."

Mr. MONTGOMERY: Were those your own observations, Doctor?

A. No, those are the observations of the attendants. This record is made by the attendants, and so received.

Mr. MONTGOMERY: If the court please, counsel was just objecting to these very observations a very few moments ago; therefore I object as not proper cross examination.

COURT: Are you willing the notes should go in?

Mr. COCHRAN: Only for the purpose of contradiction, not for the purpose of record.

COURT: They are not admissible at all unless the doctor made them. He doesn't know whether correct or not.

Mr. COCHRAN: I just inquired whether or not he observed.

COURT: He said he didn't make the examination or made these notes. They were made by the attendants.

Mr. MONTGOMERY: I ask that that answer be stricken out.

COURT: Yes.

Q. On the 18th of April, or at least at the time that he came there first, what examination did you make to discover any physical disease?

A. We usually go over the case quite thoroughly at the first examination, which includes the mental and physical examination.

Q. Did you discover any physical disease at that time?

A. No, sir.

Q. If a patient had consulted a physician on account of being unable to sleep, or if he complained of sleeplessness, tell the jury whether or not that necessarily means that he is suffering from a serious disease.

A. Of itself, it is not. It would depend on the duration and degree of the sleeplessness.

Q. Would you expect to find some organic trouble in such a patient if he had a serious disorder on account of the sleeplessness?

A. One might find a physical cause for his sleeplessness.

Q. Would an examination of the circulation, respiration, and urine disclose a disordered condition, if

the suffering was serious on account of sleeplessness?

A. Yes, it might.

Q. Assuming that the heart and lungs were normal, the abdominal cavities and the organs contained therein normal, and the urinalysis disclosed a normal condition, what can you say as to whether or not under these conditions the patient was suffering from a slight or temporary indisposition, if he could not sleep?

A. It would be impossible to determine some cases. When a case is examined, and an effort is made to determine what is producing, or may be at the foundation of the sleeplessness, if that can be determined and removed, the sleeplessness will probably disappear.

Q. But if, upon examination, these organs were found to be normal, and the functional offices of the body normal, can you tell whether or not, in your opinion, the sleeplessness would be a slight indisposition or temporary disorder, or whether it would be something serious and constitutional or organic?

A. We cannot tell without examination. Barring the qualifications you have just stated, there would be cause for alarm—for further investigation.

Q. From the patient's viewpoint, isn't it a fact Doctor, that it would indicate a mere temporary disorder, that would soon pass away?

A. It may be.

Q. Assuming, Doctor, that a patient had called at the office of a physician who was treating his wife, and while there casually inquired about his own con-

dition, was advised to take a rest, and that on the 16th of the same month, he had consulted a physician, for inability to sleep—sleeplessness and nervousness—and upon the same date was examined and his heart was found to be normal, his circulation normal, his lungs normal, his urine normal, his abdominal cavities and organs there normal, his pulse regular; and was afterwards—some four or five days taken—he went to a hospital, stayed there six days, and later some ten or fifteen days, was returned; stayed there eight or ten days and then confined in the Oregon Hospital for the Insane about the 18th of April; stayed there until the second of May; returned the 6th of June for advice; admitted to the hospital on the 7th, and died on the 14th of June of maniacal depressive insanity, you may state whether or not, in your opinion, the cause of insanity was more probably subsequent to March 16, 1911.

Mr. PLATT: Objected to on the ground that the hypothetical question leaves out a portion of the proven fact that these consultations in March were not only for sleeplessness, but for nervousness, restlessness, weakness and neurasthenia.

COURT: Those can be added, that is, the nervousness and sleeplessness can be added to the hypothetical question, making it cover that feature.

Q. Very well. Will you make that addition please Doctor, in your consideration of the question

A. If you will just read that last statement again.

Q. What, in your opinion—you may state, in your opinion, whether or not it is more probably the

case that the insanity begun, developed, and culminated in the man's death, subsequent to March 16, 1911.

A. It is very probable that the symptoms mentioned in this hypothesis were the early manifestations of the oncoming mental disturbance.

Q. Now, if I understand you, I don't think you quite answered the question fairly. It is because of our adding to it.

Mr. PLATT: I submit that it is fairly answered.

COURT: If he hasn't answered it fairly, he can.

A. I think my reply covers that.

Q. Assuming the facts given you in the question, is it a fact, Doctor, that the more probable cause of the insanity is to be found subsequent to March 16th?

Mr. PLATT: If the Court please, that is exactly a repetition of the question before, and it has been answered.

COURT: Let the doctor answer it again, if counsel isn't satisfied with his answer.

A. Will you read the question, please.

Q. (Question read).

A. You mean after March 16th

Q. Yes.

A. I think not.

Q. What effect do you give to the fact that his heart, lungs, urine, were found to be normal on the 16th of March, by examination, actual examination?

A. That is not uncommon.

Q. In other words, you contend that a man may be physically sound in every particular and have some



form of insanity?

A. I think it is possible to be physically——

Q. What is the usual rule?

A. Depends a great deal on the form of insanity, the length of time which it has existed, and the general make-up of the individual himself. In normal physical health there are always slight variations that are within what may be termed the normal limits. Today the normal pulse may be 72 or 75; tomorrow it may be 80, or may be taken immediately after eating, or immediately after exercise, or immediately upon arising. The same may be said of the urinalysis.

Q. But you know it to be normal nevertheless, don't you?

A. It may not be normal for that one instant, for that one examination, but if it continues in showing these deviations from what may be the established normal condition, then is when it becomes a diseased state.

Q. Well, doesn't the profession generally know what the limits are of a normal condition in these variations of which you speak?

A. Ordinarily they do, yes.

Q. Well, if the examination shows the conditions to be within the limits, you would pronounce it normal?

A. I would think so.

Q. And the absence of diseased conditions?

A. I would think so.

Q. Would the mere fact, then, that the patient was unable to sleep, and the heart and lungs and urine be-

ing normal, indicate a diseased condition of a serious type, or but of a temporary type?

A. If the sleeplessness was of short duration, it might amount to very little, but if it is of long standing, it is of serious moment.

Q. What is the rule of the general type of insanity, as to whether or not it is coupled with physical disorganization?

A. Insanity—certain types do not affect the general physical health much.

Q. What types are those?

A. Well, transitory types, for instance, and the border line cases, a person enjoys good physical health.

Q. That is to say, cases in which the dividing line between sanity and insanity is very slight?

A. Yes, sir. Pronounced types of insanity usually sooner or later affect the physical being.

Q. And it will show, too, will it not, in either one of these four propositions: the respiration, the heart, and the urine, will it not?

A. It may.

Q. Is that the rule?

A. Not necessarily the rule. No established rule.

Q. Just one of the possibilities of human nature, is it?

A. Yes, sir.

Q. You don't know whether Mr. Moats was insane on March 16th and prior thereto or not, do you?

A. I believe he was.

Q. You believe he was?

A. Yes, sir.

Q. You believed it from what you know afterwards or from his condition on the 16th?

A. I believe it from my personal investigation of the case after he appeared at the insane asylum, and from the subsequent history and from the evidence I have heard here in this case.

Q. Having sat here and heard the testimony?

A. Yes, sir.

Q. What type of insanity did he have on the 16th day of March?

A. My diagnosis was not made at that time.

Q. No, but then from——

A. But the ultimate diagnosis was manic depressive insanity.

Q. That was on the 14th of June?

A. Yes, sir.

Q. But you are unable to classify his condition on the 16th of March, are you?

A. I would classify it in a similar manner.

Q. Similar manner?

A. Yes, sir, similar classification.

Q. Do you have any evidence of his being in a depressed condition on the 16th of March?

A. Well, from his own statements—the personal observation of the case after he came under my care. I have his own statement.

Q. He said he was depressed on the 16th of March??

A. Yes, sir—well, not necessarily the 16th of

March, but previously—had been depressed for some time.

Q. And was he—were other propositions connected with it outside of the depression?

A. Well, statements that he had been unduly interested in religious matters. He dwelt upon this subject to the extent that he couldn't sleep; often found himself in a dreamful state, as he expressed it to me a number of times. Later, when he became more disturbed, he explained that he was there being sanctified or receiving sanctification, detailing it a little more closely.

Witness excused.

CHESTER C. HAMILTON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. Where do you reside, Mr. Hamilton?

A. Kalama, Washington,

Q. What line of business?

A. I am clerking at the present time.

Q. How long have you lived at Kalama?

A. I have been there something like two weeks, I think it is.

Q. Where did you formerly live?

A. At Summerville, Oregon.

Q. Were you acquainted with George Scott Moats during his life time?

A. Yes, sir.

Q. How long a period of time have you known him?

A. I met him long about—the 14th or 15th, I should judge, of August, 1909.

Q. Were you ever present at any revival meetings at which Mr. Moats was present?

A. Yes, sir.

Q. State—explain to the jury his conduct on those occasions.

A. Well, he seemed to take quite an interest in the meetings—religiously inclined, and he would, when they were trying to get converts, why, he would come back and work on them, talk to different people, things of that kind.

Q. Do you recall any direct exclamations of excitement from him at any of those meetings?

A. Nothing only that he was—one evening he said that he was sanctified—had sanctification.

Q. Was he notorious in the community as a church worker?

A. Yes, sir.

Q. Were you—did you see Mr. Moats at all during the early part of March, 1911?

A. Yes, sir.

Q. At that time what was his condition with reference to being nervous or not nervous?

A. What dates, please?

Q. At any time between the first and fourteenth of March?

A. I don't recall of meeting him at any time only



along somewhere about the 12th of March, I think it was, in La Grande. Met he and his wife on the street there.

Q. What was his condition at that time?

A. Well, he seemed a little nervous. He didn't stand still, and he was a man of—that is, always had a habit of folding his arms and unfolding them at any time when you were talking to him, but he didn't stand still that day. But I didn't notice anything in particular, you might say.

Q. Did the plaintiff in this case, Mrs. Moats, ever make any admissions to you at any time with reference to her knowledge of his nervous condition?

Mr. COCHRAN: Objected to as incompetent, immaterial and irrelevant, leading and suggestive.

COURT: I suppose the question would be in better form if he inquires if he ever had any conversation with Mrs. Moats about the matter, and if so, to state it.

Q. Did you ever have any conversation with Mrs. Moats concerning Mr. Moats' condition?

A. Not until the day that Mr. Moats died, no.

Q. What date was that?

A. Some time in June, I believe it was. I am not exact what date—positive about the date.

Q. What did she say at that time?

A. She made the statement that—my mother and I were present, and she made the statement, something about—says: "Oh, you don't know—you folks don't know what a time I have had." or something of that kind, a remark of that kind.

Q. Did you have any conversation with Mr. Moats on or about the 12th of March, 1911?

A. Yes, sir.

Q. Was anything said at that time with reference to insurance?

A. Yes, sir.

Q. State what that was.

A. I met Mr. and Mrs. Moats on the street and stopped and shook hands with them. Talked with them probably five or ten minutes. Mr. Moats asked me if—where was a good place to take some insurance. I studied for a minute, and I took him across the street to a friend of mine; introduced Mr. Moats and Mrs. Moats, and left them talking to this friend. I can't say positive as to the date, but it was on or about the 12th.

Q. To whom did Mr. Moats go on your suggestion?

A. Dr. Logan of La Grande.

Cross Examination.

(Questions by Mr. COCHRAN):

Q. Were there others there at the meeting doing personal work?

A. Yes, sir.

Q. In fact, the usual plan of church workers was to aid the minister, and also do personal work among those who were not members, to urge them if possible, to become members?

A. Yes, sir.

Witness excused.

Mr. MONTGOMERY: I would like at this time, if the Court please, to proceed with the reading of the depositions that were introduced in evidence this morning. I will read first the deposition of John C. McCall, taken on the 29th day of April, 1912, before Lewis H. Cooke, a notary public in and for the State of New York.

Mr. COCHRAN: May it please the Court, I found nothing in the revised statute requiring me to submit any objections that might be desirable to make at the time the deposition was taken.

COURT: Objections to the question?

Mr. COCHRAN: I understand that the objections will be made now, and be of the same force and effect.

COURT: I am not so sure about that. They were not made at the time the depositions were taken?

Mr. COCHRAN: No, I made no appearance in New York.

COURT: Proceed with the reading of the deposition.

Mr. MONTGOMERY reads Exhibit B, McCall deposition, and reads same without objection until the 46th interrogatory, after the reading of which objection as follows:

Mr. COCHRAN: We object to the reading of McCall's Exhibit F as hearsay.

COURT: That is the telegram from the investigator Pickford back to the home office?

Mr. COCHRAN: Yes.

COURT: That wouldn't be substantive evidence, a declaration of the company's agent in its own interest.

Mr. MONTGOMERY: Under the statute at the time these depositions were taken, ample opportunity was given for their appearance to make objections.

COURT: They have a right to state exceptions to the competency of the testimony, in any event. I don't think you need to read that at all.

Mr. MONTGOMERY: Save an exception. The next few questions relate to the instrument, so I will avoid reading that. I will therefore omit reading down to the fiftieth interrogatory.

Mr. MONTGOMERY continues reading deposition down to the fifty-third interrogatory "Based upon your general knowledge and experience in the business of life insurance, state whether or not, if it appeared to a life insurance company at the time of acting upon an application of insurance that the applicant whose application was under consideration was at the time of signing such application suffering from nervousness and sleeplessness, and that for a period of some time, say in the neighborhood of two months prior to the date of his application, he was suffering from sleeplessness and nervousness and was excitable, and had attended various religious meetings, at which he made excessive demonstrations of religious enthusiasm, how would such facts affect the action of an insurance company in passing upon the application?"

Mr. COCHRAN: We desire to object to that question.

COURT: No objection made at the time it was brought up?

Mr. COCHRAN: No, sir.

COURT: I don't think you can object to the question now, if no objection was made at the time. I suppose he can answer.

Mr. COCHRAN: Save an exception.

"Answer (read as follows): The company would decline an application where such facts were disclosed. Under the rules that obtain in passing upon applications for insurance, no company that I know of would accept an application with knowledge of such facts."

Mr. COCHRAN: We move that the latter part of the answer commencing with the word "no", and down to the word "facts" be stricken out as not responsive.

COURT: That is the opinion of the witness, what another would do.

Mr. MONTGOMERY: That is the question, based on his general knowledge of the business and the practice prevailing amongst insurance companies generally, what would be his opinion with reference to the acceptance of the application.

COURT: Let it stand.

Mr. COCHRAN: Save an exception.

Mr. MONTGOMERY (reading 54th interrogatory): State, if you know whether or not the disabilities described in the last question are found by experience to affect mortality, and if so, are material to the risk?

Mr. COCHRAN: I object to that question because the witness is not competent to testify.



COURT: Let him answer. No objection to the question as propounded. It stands here as a proper statement.

Mr. COCHRAN: If the Court please, I didn't get that. That is the form.

COURT: This deposition was taken upon notice, and no objection made to these questions, and therefore they stand here without any objection at all, as if the witness had testified upon the stand without objection.

Deposition of Norman R. Haskell read without objection until the 25th interrogatory "How did you receive that information. A. By telegram."

Mr. MONTGOMERY: I suppose you have the same objection and the same ruling?

COURT: The objection as to the contents of the telegram.

Mr. MONTGOMERY proceeds with the reading of the deposition of Albert J. Pickford, which is read into the record without objections.

Mr. MONTGOMERY: I desire also to read at this time the depositions of Calvin L. Harrison, and William H. Stoddard, which were taken pursuant to notice, and in accordance with the provisions of sections 863-4-5 of the revised statutes.

Thereupon the depositions of Calvin G. Harrison and William H. Stoddard were offered in evidence and received without objection, marked defendant's Exhibit F, of which the following is a copy:

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,  
Defendant.

NOTICE

TO IDA M. MOATS PLAINTIFF ABOVE NAM-  
ED, AND COCHRAN & COCHRAN, HER AT-  
TORNEYS OF RECORD:

Please take notice that the defendant herein will take the testimony of Calvin L. Harrison and William Stoddard, both of whom reside at the City of New York, state of New York, and others, each and all of whom reside more than one hundred miles from the place of trial herein and more than one hundred miles from any place at which a District Court of the United States for the District of Oregon, is appointed to be held by law, at the final hearing for use on behalf of the defendant before Louis H. Cooke, a notary public in and for the county of New York, State of New York, who is not of counsel or interested in this cause, at his office, No. 346 Broadway, in the City of New York, and State of New York, on the 15th day of May, 1912, at 11 o'clock a. m., and thereafter from day to day as the taking of the depositions may be adjourned; and such testimony will be so taken in accordance with the provisions of sections 863, 864 and

865 of the revised statutes of the United States.

PLATT & PLATT and HUGH MONTGOMERY,  
Attorneys for Defendant, 901 Board of Trade Bldg.  
Dated at Portland, Oregon, this 30th day of April,  
1912.

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

DEPOSITIONS ON BEHALF OF DEFENDANT.

Depositions of Calvin L. Harrison and William Stoddard taken pursuant to the annexed notice before me, Louis H. Cooke, a Notary Public in and for the County of New York, and State of New York, at my office, 346 Broadway, in the City of New York and State of New York; on the 15th day of May, 1912, at eleven o'clock A. M., to be read in evidence on behalf of the defendant on the trial of the above entitled cause.

CALVIN L. HARRISON, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith as follows:—

First Interrogatory:

Please state you name, age, place of residence

and occupation.

Answer to First Interrogatory:

My name is Calvin L. Harrison. I am forty-nine years of age. I reside at Mamaroneck, Westchester County, New York. By occupation I am a Medical Examiner and a member of the Medical Board of the defendant, New York Life Insurance Company, at its Home Office in New York City.

Second Interrogatory:

What profession, if any, do you belong to?

Answer to Second Interrogatory:

I am a physician and surgeon.

Third Interrogatory:

Where, and when, were you educated?

Answer to Third Interrogatory:

I was graduated at Yale College with the degree of Bachelor of Philosophy in the year 1884, and I studied medicine three years after that and was regularly graduated as a Doctor of Medicine at the College of Physicians and Surgeons in New York City in the class of 1887.

Fourth Interrogatory:

Since your graduation at the College of Physicians and Surgeons in New York City in 1887 what has been your occupation and employment?

Answer to Fourth Interrogatory:

My occupation has been solely in the line of my

profession as a physician and surgeon. My employment for the first three years after my graduation from the Medical School, that is, until 1890, I was in general practice in New York City. In 1890 I entered the employ of the New York Life Insurance Company in its Medical Department as one of its Examiners and a member of its Medical Board at its Home Office in the City of New York, which employment I have held ever since the year 1890 and still hold.

**Fifth Interrogatory:**

What are and ever since the year 1890 have been your duties as a Medical Examiner and a member of the Medical Board of the defendant at its Home Office?

**Answer to Fifth Interrogatory:**

During all that time it has been my duty to examine applications for insurance, including declarations made by applicants for insurance to the Company's Medical Examiners and the reports of the Medical Examiners on each such examination for the purpose of passing upon such applicants as insurance risks, and also during all the period of my employment with the defendant it has been my duty to, and I have studied the mortality experience of this and other Companies, and the effect upon mortality of various physical illnesses and defects, and generally to perform such duties as a person in the employ



of a large life insurance company as a Medical Examiner and a member of its Medical Board at its Home Office would be required to do in the selection of risks for the Company and in passing upon applications for insurance.

**Sixth Interrogatory:**

During the years that you have been in the employ of the defendant have you had any other occupation or employment except as Medical Examiner and a member of the Medical Board of the defendant at its Home Office?

**Answer to Sixth Interrogatory:**

I have not. I have given my entire time and service to the defendant in the capacity I have stated.

**Seventh Interrogatory:**

You may state whether or not as a Medical Examiner of the defendant and a member of its Medical Board at its Home Office you have had anything to do with that application of George Scott Moats, which is dated the 16th day of March, 1911, for insurance on his life in the sum of \$10,000. If so, what did you have to do with it?

**Answer to Seventh Interrogatory:**

I did. Said application, including the applicant's declarations to the defendant's Medical Examiner and the Medical Examiner's Report on the reverse side thereof, duly came into my hands in the regular course of my duties as an employee of the defendant for the purpose of

passing upon said application for insurance, and I examined and considered said application, declarations and Medical Examiner's Report and passed upon the same for the defendant on the 24th day of March, 1911.

**Eighth Interrogatory:**

I will ask the Notary if he has in his possession the deposition of John C. McCall in the case, in this Court of Ida M. Moats against New York Life Insurance Company, and if so, will the Notary kindly produce for the use of the witness the paper which is attached to said deposition of the witness McCall and identified by him as McCall's Exhibit A, and also that other paper which is attached to McCall's said deposition, and identified by him as McCall's Exhibit B?

BY THE NOTARY: I have the papers you refer to in my possession and produce them for the use of the witness.

**Ninth Interrogatory:**

You may examine the paper that is attached to the deposition of John C. McCall in the case in this Court of Ida M. Moats against New York Life Insurance Company, and is identified by him as McCall's Exhibit A, and that other paper which is attached to said deposition of John C. McCall in said case and is identified by him as McCall's Exhibit B, and state whether or not you have seen those papers before, and if so, where, and when, under what circum-

stances, and what you had to do with them, and what you did with them?

Answer to Ninth Interrogatory:

I have seen both of said papers before, McCall's Exhibit A came into my hands on the 24th day of March, 1911, in the regular course of my business as a Medical Examiner and a member of the Medical Board of the defendant, for the purpose of accepting or rejecting Mr. Moats' application for insurance. I carefully read and considered the application for insurance, together with the Medical Examiner's Report on the reverse side of the declarations made to the Medical Examiner, which I include in the application for insurance, and relying upon the statements contained therein as true, and especially upon the statements contained in the applicant's declarations to the Medical Examiner, I advised the Company that the applicant was an insurable risk and to prepare and issue the policy as applied for.

Tenth Interrogatory:

Will you identify as exhibits and attach to, make a part of and return with your deposition a full, true and correct copy of said McCall's said Exhibit A and McCall's Exhibit B, which you have referred to in your last answer, stating as a part of your answer how you have identified said copies.

Answer to Tenth Interrogatory:

I will and have done so. I have identified said

copy of McCall's Exhibit A as Harrison's Exhibit A and said copy of McCall's Exhibit B as Harrison's Exhibit B.

**Eleventh Interrogatory:**

Did you or not at the time you passed upon said McCall's Exhibit A make any record thereof? If so, where, and when?

**Answer to Eleventh Interrogatory:**

I did. I made a record thereof on the defendant's Home Office Memorandum, the original of which is attached to McCall's deposition in said case and identified by him as McCall's Exhibit B and a copy thereof is attached to this deposition, identified as Harrison's Exhibit B.

**Twelfth Interrogatory:**

Please state what entry you personally made on McCall's Exhibit B?

**Answer to Twelfth Interrogatory:**

The entry was made by me thereon as follows, —“MAR 24 1911 ADVISED AT per cent M 70 CLH.”

**Thirteenth Interrogatory:**

What part of the entry made by you is in your own handwriting?

**Answer to Thirteenth Interrogatory:**

The figures “70” and the initials “CLH” opposite the stamp “Mar 24 1911 ADVISED AT per cent M.”

**Fourteenth Interrogatory:**

When did you put said writing on McCall's Exhibit B?

Answer to Fourteenth Interrogatory:

At the time of the examination and immediately upon the conclusion of my examination of McCall's Exhibit A.

Fifteenth Interrogatory:

What was understood by the writing you put on McCall's Exhibit B under the defendant's method of doing business,

Answer to Fifteenth Interrogatory:

The writing of the figures "70" before my initials on McCall's Exhibit B is the defendant's way of making up its original record of its action on Mr. Moats' application, McCall's Exhibit A, and is its way of stating that the application, including the declarations made to the Medical Examiner and the Medical Examiner's Report, had been examined and considered by me and was acceptable to the Company, the 70 meaning that McCall's Exhibit A showed the risk to be better than normal and one which the Company was ready to take.

Sixteenth Interrogatory:

In passing upon McCall's Exhibit A, what did you place your reliance upon?

Answer to Sixteenth Interrogatory:

Solely upon the statements contained in McCall's Exhibit A.

Seventeenth Interrogatory:

Did you or not at that, or any other time, have before you, or consider any other papers, statements, or things whatsoever in acting for the



defendant on McCall's Exhibit A?

Answer to Seventeenth Interrogatory:

I did not.

Eighteenth Interrogatory:

You may state whether or not in acting on McCall's Exhibit A you believed the answers contained in the declarations made by Mr. Moats to the Company's Medical Examiner, as shown by McCall's Exhibit A, to be true?

Answer to Eighteenth Interrogatory:

I did.

Nineteenth Interrogatory:

Upon what, if you know, did the defendant base its acceptance of Mr. Moats' said application, McCall's Exhibit A?

Answer to Nineteenth Interrogatory:

Solely upon the belief that the declarations made by him to the defendant's Medical Examiner, as shown by McCall's Exhibit A, were true, as well as the other statements contained in McCall's Exhibit A.

Twentieth Interrogatory:

What, if you know, is the purpose of asking the applicant for insurance, Question No. 11 in the declarations made to the Medical Examiner, constituting a part of McCall's Exhibit A, namely, "Have you been under the care of, or consulted a physician concerning yourself for any cause within five years. If so, for what ailment, name and address of physician"?

Answer to Twentieth Interrogatory:

The purpose of this question is to bring out the condition of the applicant's physical history as to ailments and to put the Company in possession of all such facts and to give it the names of the proper persons to whom it may apply to find out details, namely, the physician, or physicians, if any, whom the applicant has consulted or who have treated him.

Twenty-first Interrogatory:

Suppose Mr. Moats in his declarations to the Medical Examiner, as evidenced by McCall's Exhibit A, had said in answer to Question No. 11 that he had consulted a physician that day for insomnia and nervousness, giving the name of the physician,—would you or not have approved, or would the defendant have accepted his application for insurance?

Answer to Twenty-first Interrogatory:

No.

Twenty-second Interrogatory:

Suppose Mr. Moats in answering Question 9 in the Declarations to the Medical Examiner, instead of answering "No" to the question as to whether or not he had ever suffered from any disease of the brain, or nervous system, had said in answer thereto that he was then suffering from Insomnia,—what effect, if any, would such answer have had on the defendant's action on McCall's Exhibit A?

Answer to Twenty-second Interrogatory:

It would have had a very material effect. The defendant would not have accepted the application.

Twenty-third Interrogatory:

Why?

Answer to Twenty-third Interrogatory:

Because insomnia is a serious mental disorder and a person who is suffering from Insomnia is not an insurable risk, for insomnia is likely to result within a comparatively short time either in insanity, suicide, or other calamity. Of course, it does not always so result, but as affecting an application for life insurance it must be, and always is treated as a very serious disorder, making the person suffering therefrom entirely uninsurable at the time.

Twenty-fourth interrogatory:

You may state, if you know, as to whether or not there is any well defined practice, usage or custom among Life Insurance Companies generally when they act upon an application for insurance, which shows that the applicant on the date of the application and before making the application consulted a physician for nervousness and insomnia. If so, please state what such practice, usage or custom is.

Answer to Twenty-fourth Interrogatory:

Yes, there is. The practice, usage and custom among Life Insurance Companies generally in such a case is to decline the application.

Twenty-fifth Interrogatory:

Suppose an application showed that on the date of the application and before the application was signed the Applicant had consulted a physician for nervousness or insomnia, and that for a period of some time prior to the date of the application, say in the neighborhood of two months, he had been suffering from insomnia and nervousness and was excitable, and had attended various religious meetings at which he made excessive demonstrations of religious enthusiasm; how, if you know, would such facts affect the action of an Insurance Company in passing upon an application for insurance?

Answer to Twenty-fifth Interrogatory:

Under such a state of facts every Insurance Company would decline the application.

Twenty-sixth Interrogatory:

Suppose in the declarations made to the Company's Medical Examiner the applicant was asked the following question, namely, have you ever had or suffered from any of the following diseases, "Of the brain or nervous system" and the applicant made answer thereto in substance as follows, "Yes;" "Name of Disease": "Insomnia"; "Number of attacks: For several weeks

past”; Date: for about two months last past”; “Duration: for several weeks”; “Severity: moderate”; “Results: not determined”— are you able to state from your knowledge of the practice and usage among Life Insurance Companies generally as to whether or not a Life Insurance Company having before it such facts would accept such application? If so, you may state, and also state as to whether or not the defendant would have accepted the Moats application, McCall’s Exhibit A, if it had so stated in substance or effect.

Answer to Twenty-sixth Interrogatory:

I am able to state. Under the practice and usage obtaining among Life Insurance Companies generally a Life Insurance Company having before it such facts would decline the application. Also the New York Life Insurance Company would have declined the Moats application if it had shown the state of facts assumed in the question, or any state of facts substantially the same as is assumed in the question.

Twenty-seventh Interrogatory:

You may state, if you know, what the practice and usage of Life Insurance Companies generally is in acting upon an application for insur-



ance where it appears from the declarations made to the Medical Examiner that the applicant on that day consulted a physician for insomnia.

Answer to Twenty-seventh Interrogatory:

The Practice and usage of all Companies in such a case is to decline the application.

Twenty-eighth Interrogatory:

What is the practice and usage of the defendant in such case? ....

Answer to Twenty-eighth Interrogatory:

To decline the application.

CALVIN L. HARRISON,

Subscribed in my presence and sworn to before me this 15th day of May, 1912.

[Seal.]

LOUIS H. COOKE,

Notary Public, New York County, No. 108; and New York Register No. 4032.

My Commission Expires March 30, 1914.

[McCall's Exhibit A.]

4,258,252.

4,258,253.

APPLICATION TO THE NEW-YORK LIFE INSURANCE COMPANY.

1. A. Name of the person applying for insurance.

NOTE—WRITE THE NAME IN FULL.

George Scott Moats.

B Residence: State, Oregon; County, Union;  
Town, Near Summerville; Street, .....; No.,.....

C Place of business, Same Same; Name of  
firm, No firm.

D To what address shall notices of premium be  
sent? Summerville, Oregon.

---

2. A Present occupation, Farming:

B Other occupations if any.

C State your exact duties in full. Retiring.

D Are you married? Yes.

---

3. A Place of birth, Illinois.

B Race or Nationality, White.

C Born on 2 day December, 1877:

D Age nearest birthday, 33.

---

4. A Are you now insured in any Company or So-  
ciety? (Answer "yes", or "No.")

No.

B If so state in what Companies or Societies and the amount insured in each.....

C Have you an application now pending in any Company or Society?

No.

D If so give name of Company or Society .....

---

5. A Has any Company or Society ever declined to issue a policy on your life?

No.

B If so, state name of Company or Society.....

---

6. A Has any Company or Society ever issued, or offered to issue, a policy on your life differing from the one then applied for?

No.

B If so, state name of Company or Society, and give particulars .....

---

7. A To whom shall the proceeds of the insurance applied for be payable in event of death?

NOTE—GIVE CHRISTIAN NAMES IN FULL.

Mrs. Ida May Moats, wife; George Albert Moats, son 12 years old.

B Present residence, Summerville, Oregon.

C Relationship to you.

---

8. Sum to be insured, \$10,000; \$5,000 to Mrs. Ida May Moats. \$5,000 to George Albert Moats, my son. 2 Pol's of \$5,000 each.

Premium payable annually.

With..... waiver of premiums in case of permanent total disability.

On what table?

NOTE—

Strike out the rates and plans, not desired.

Ordinary life.

Life..... Premiums.

Endowment, payable in ..... years.

---

I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime and that, unless otherwise agreed in writing the policy shall then relate back to and take effect as of the date of this application. 2. That any payment on account of the first premium before delivery of the policy to me shall be binding on the Company only in accordance with the Company's receipt therefor on the coupon receipt form duly filled out and detached from this application, which is the only authorized form of receipt for such duly filled out and detached from this application, has no authority to make, modify or discharge contracts, or to waive any of the Company's rights or requirements.

Dated at La Grande, Org., this 16th day of March, 1911.

Signature of the person applying for insurance.  
(Write the name in full.)

George Scott Moats.

Witnessed by H. P. Lewis, Agent.

Other Agents, .....

---

910-486.

Names and Residences of three intimate friends.

F. L. Myers, Cashier La Grande, Org.

D. R. McKenzie, Summerville, Org.

J. M. Choate, Summerville, Org.

[Harrison's Exhibit A.]

O C 106948

STATEMENT TO BE SIGNED BY APPLICANT  
UPON PAYMENT OF THE PREMIUM OR  
ANY PART THEREOF.

Dated at La Grande, Org., March 16th, 1911.

I HEREBY DECLARE that I have paid to H. P. Lewis, Two Hundred Sixty Eight 30|100 Dollars in cash, and that I hold his receipt for the same, made up, without alteration, on the receipt form detached from and corresponding in date and number with this Application. I assent to the terms of said receipt.

(Signature of Applicant)

GEORGE SCOTT MOATS.

THIS BLANK MUST ACCOMPANY EVERY  
APPLICATION FOR INSURANCE ON THE  
LIFE OF A WOMAN.

Name of Applicant.....

Age .....

Married?



Single?

Widow?

(Erase the two not applicable.)

Maiden Name .....

(If applicant is married or a widow, full maiden name must also be given.)

Residence .....

---

IF SINGLE.

1. Do you reside at home with your parents?

1.

2. If not, where and with whom?

2.

---

IF MARRIED.

3. A. Is your husband living?

3. A.

B. If so, is he in good health?

B.

C. Give his age and occupation.

C.

---

4. A. How much life insurance does he carry?

4. A.

B. In what companies?

B.

C. If he carries no insurance, why does he not insure?

C.

---

5. A. How many children have you? Give age of each.

5. A.

B. If childless, how long married?

B.

---

---

IN ALL CASES ANSWER THESE QUESTIONS.

---

6. State your occupation fully.

6.

---

7. What income do you derive therefrom?

7.

---

8. Have you any other source of income?

8.

---

9. If so, state amount.

9.

---

10. Who will pay the premiums on this insurance?

10.

---

I HEREBY AGREE that the above answers shall form a part of my application to the New-York Life Insurance Company dated at ..... on the ..... day of ..... 19..... and I hereby renew and confirm my agreement therein.

.....

Signature of the person applying for insurance.  
Witness.

.....  
Dated at ..... 19.....

2400. May, 1909.

Cashiers will fill out this blank correctly and distinctly.

NAMES AND ADDRESSES OF EVERY AGENT  
TO WHOM THIS BUSINESS BELONGS?  
AND HIS SHARE IN THE AMOUNT  
OF THE POLICY.

NAME.	ADDRESS	SHARE
H. P. Lewis	Oregon, Br.	all

AGENT TO WHOM THE BUSINESS BELONGS  
BY CONTRACT.

Do

Do

[Harrison's Exhibit A.]

NOTICE TO MEDICAL EXAMINER: Use only  
black ink.

This examination is to be photographed.

THIS EXAMINATION MUST BE MADE IN PRIVATE: NO AGENT OR THIRD PERSON BEING PRESENT.

To be filled out by the Medical Examiner only)

ANSWERS MADE TO THE MEDICAL EXAMINER, .....

In continuation of and forming a part of my Application for Insurance in the NEW-YORK LIFE INSURANCE CO., dated Mar. 16th, 1911.

---

1. A. What is your occupation? (Full details.)

A. Farmer.

B. How long have you been engaged in your present occupation?

B. 6-7 yrs.

C. What was your previous occupation?

C. Merchant.

D. Do you contemplate making any change, temporary or permanent, in your occupation? (If so, give full details.)

D. No.

---

2. Do you contemplate changing your residence, or making a journey, or is there any probability that you will do either? (If so give full details).

No.

---

3. In what States have you lived the last ten years, and which years in each. If outside the U. S.,

in what countries, and which years in each?)  
Oregon.

---

4. A. Have you now any connection, direct or indirect, with the manufacture or sale of wines, spirits or malt liquors?

A. No.

B. Have you ever had any such connection? (If so, in either case, give full details.)

B. No.

---

5. A. What is your daily consumption of wine, spirits or malt liquors?

A. None.

B. What has it been in the past?

B. Not for years. Occasionally a little beer.

C. Have you at any time used alcohol or drugs to excess?

C. No.

---

6. Have you ever raised or spat blood? (If so, give full details.)

No.

---

7. What is the name of the agent who induced you to make this present application?

Mr. H. P. Lewis.

---

8. A. Has any life insurance Company ever examined you, either on an application for insurance or for



any other reason, without issuing a policy? (If so, state name of Company).

A. No.

B. Has any Life Insurance Company ever issued or offered to issue a policy on your life different from the one applied for? (If so, state name of Company, and give particulars.)

B. No.

---

9. Have you ever had or suffered from any of the following diseases? Answer "Yes" or "No" to each part of this query below. (Give explicit answers and particulars in each case—the Examiner should satisfy himself that the applicant gives FULL and CAREFUL ANSWERS to this question.

"Yes" or "No"; Name of Disease; No. of Attacks; Date; Duration; Severity; Results.

---

A. Of the Brain or Nervous System?

No.

B. Of the Heart or Lungs?

No.

C. Of the Stomach, Liver, Kidneys or Bladder?

No.

D. Of the Skin, Middle Ear or Eyes?

No.

E. Rheumatism or Gout?

No.

---

10. A. Have you ever suffered from any disease

not mentioned above?

- A. Nothing except grippe and acute dysentery.  
 B. Have you ever had any accident?  
 B. No.

11. A. Have you been under the care of or consulted a physician concerning yourself for any cause within five years?

A. Once 3 yrs. ago.

B. If so, for what ailment; name and address of physician?

B. A pain in the back. N. Molitor, La Grande.

		Age if Living.....	Condition of Health, if not good, give full details .....	Age at Death .....	Cause of Death.....	How Long Ill .....	Details .....	Previous Health .....
12. FAMILY RECORD.								
Father .....		84	good					
Mother .....		69	good					
	(	47	good					
	(	45	good					
	(	44	good					
Brothers 7 .....	(	35	good					
	(	36	good					
	(	31	good					
	(	24	good					
Sisters 3 .....	(	45	good					
	(	42	good					
					Cholera			
					6 Mo. Infantum			

NOTE.—In case death was not due to acute disease, give details of last illness, and, in case of parents, the year of death.  
 Ages attained by Father's Father's Mother's Mother's  
 Grandparents..... Father 92 Mother Old Father Old Mother Old

A. Is any person in your immediate household now or within two Years been ill with consumption?

A. No.

B. Or has any one of them recently died of that disease?

B. No.

---

I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that to the best of my knowledge and belief I am a proper subject for life insurance.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Signature of the person applying for insurance.

GEO. S. MOATS.

GEORGE SCOTT MOATS.

Witnessed by H. L. Underwood, M. D., Medical Examiner.

911-31

---

For filing

DO NOT WRITE

on this corner.

(To be filled out by the  
Medical Examiner only.)

## MEDICAL EXAMINER'S REPORT.

---

13. Rate of the pulse (while seated) 72; Its character? Normal.

---

14. Age? 33 years. Does age as given seem correct? Yes.

---

15. Exact height, 5 feet 9½ in. Exact weight, 187½ lbs. Girth of chest at fourth rib, 39 in. Girth of abdomen at umbilicus, 36 in.

---

16. How well do you know applicant? Not previously.

17. Complexion, Florid; Color of Hair, Brown; Eyes, Brown.

---

18. Is applicant's general appearance healthy? Yes.

19. Is applicant deformed, No; lame or maimed? No.

20. Is applicant a Caucasian? Yes.

(If not, what is applicant's race?)

---

21. Has applicant recently gained weight? (If so, how much and to what is it due?) No.

22. Has applicant recently lost weight? (If so, how much and to what is it due?)

No—possibly a few pounds.

---

23. Is applicant's build a family characteristic or an individual characteristic? Family Characteristic.

24. Are there any marks of smallpox or of successful vaccination? Yes.

---

4,258,252.

4,258,253.

25. Do you find after careful enquiry and physical examination, any evidence of past or present disease?

(If so, give full details.)

A. Of Brain or Nervous System?

A. No.

B. Of the Heart or Lungs?

B. No.

C. Of the Stomach or any of the Abdominal Organs?

C. No.

D. Of Rheumatism or Gout?

D. No.

E. Of the Skin, Middle Ear, Eyes, or any part of the body?

E. No.

---

26. A. Does chemical examination of the applicant's urine show albumen or sugar (even in traces) or any abnormality?

A. No.

B. State specific gravity, and if it is below 1015 or above 1025, give your opinion below as to the cause.

B. 1024.



C. Has applicant ever had any genito-urinary ailment? (Syphilis—Stricture, &c.) (If so, give full details.)

C. No.

---

#### IF A WOMAN.

27. D. Number of children had, if any?

D.

E. Ages of those living?

E.

F. Is she now pregnant?

F.

G. Have her pregnancies and labors been normal?

G.

H. Has she passed the climacteric?

H.

J. Has she ever had any disease peculiar to her sex?

J.

---

28. Have you ever seen the applicant under the influence of alcohol or drugs?

A. No.

B. Do you know or suspect, that the applicant is now, or ever has been, intemperate?

B. No.

---

29. Considering the amount of insurance which applicant already carries, is the amount applied for in accordance with the applicant's apparent means and surroundings?

Yes.

---

30. Is there anything about the applicant's character, residence, mode of life or occupation which would render the risk in any way undesirable?

No.

---

31. Have you reviewed all answers in this Report; and are you sure they are clear and complete? (Any erasures or alterations should be initialed by the Examiner.)

Yes.

---

32. Do you believe that the applicant has given full and true information in all respects?

Yes.

---

I certify that I have carefully examined Geo. Moats of Summerville, Oregon, in private at La Grande, Ore., this 16th day of March, 1911, for an insurance of \$10,000 on the applicant's life; that the applicant's "Answers made to the Medical Examiner" on the other side of this sheet are in my handwriting and are exactly as made by the applicant to me, and that the applicant signed them in my presence.

H. L. Underwood, M. D., La Grande, P. O. Address.

---

The Examiner is requested to send direct to the Company in New York City any information which,

for any reason, he prefers not to embody in this report. He can also mail this report direct to the Company if he prefers.

---

**SPECIAL NOTICE TO MEDICAL EXAMINER.**—The attention of the Medical Examiner is called to the fact that policies issued by this Company are free from all restrictions as to residence, travel or occupation, and are incontestable after one year. Every endeavor should be made, therefore, to make this report as complete and precise as possible; the object being to give the Home Office a pen picture of the applicant as he presents himself to you. If in addition, therefore, you know of any fact, or have any impression not expressed above, that in your judgment would probably influence the Home Office in its estimate of the risk, please note it below.

**ADDITIONAL REMARKS.**

**[Harrison's Exhibit B.]**

Mar. 27, 1911.

**HOME OFFICE MEMORANDUM.**

This Memo must be attached **OVER** all the papers of the Application to which it refers, and must not be detached therefrom. All memoranda must be carefully typewritten, dated and initiated.

B. & F. H. 100-15.

Resid. ....

Occup'n 15.

Habits .....

Ph. Cond. ....

Pers'l H. ....

Race |70|

Policy No.

4,258,252.

4,258,253.

Branch Offices must be careful to fill in the information herein called for, before forwarding application to Home Office, otherwise the application will be suspended for particulars.

Mar. 23, 2:30 P. M.

X Name of Insured.

GEORGE SCOTT MOATS.

---

Date of Birth, Dec. 2nd, 1877. Age, 33. Amount \$10,000.

---

Residence: State, Oregon. County, Union. City, Town or Village, Summerville.

---

Post Office Address, Where the Premium Notices are to be sent.

---

State, Oregon. County, Union. City, Town or Village, Summerville. Street, X. No., X.

---

1. IDA MAY MOATS, wife, and GEORGE ALBERT MOATS. son.

(2) Name of Beneficiary.

---

Date 3|18|11 Application received at Oregon Branch

Office.

---

3|18|11 Memorandum for Inspection sent out G. L.

---

Date Mar. 23, 1911, (RECEIVED-INVOICED)  
(NO RECORD-INS. )

---

Mar. 23, 2 P. M. Index 18.

24, 1911, ADVISED AT PER CENT M 70 CLH.

---

FORWARDED POL. NO.

AS ADVISED.

---

MAR. 24, 1911, REFERRED TO CLASS COM.  
o|a amt (Rule) A. Bergholz.

---

MAR. 24, 1911, Amt O K W S.

---

MAR. 25, 1911, RECEIVED IN DIV. POL. IS-  
SUES THIS DAY.

---

MAR. 27, 1911, FORWARDED POL. NO. 4,258,-  
252, 4,258,253 AS ADVISED Subj. Amend 3 & 8 M.

---

APR. 7, 1911, FILED BY NO. 42. APR. 17, 1911,  
FILED BY NO. 12.

---

DEAD.

---

9|14|11 Dr. Vander Poel wrote Dr. F. V. Brooks  
sent 9|14 H. R. Brown, Jr.

---



10|5|11 See letter filed herewith. H. R. Brown, Jr.

THE ONE USING LINE ABOVE, MUST ATTACH CONTINUATION SHEET.

2065. Jan., 1909.

INSURANCE STATEMENT.

Number	Amount	Plan	Return Premium $\frac{1}{4}$ , $\frac{1}{2}$ or all	Insurance Commenced	Paid or Extended to	Agents
--------	--------	------	--	------------------------	------------------------------	--------

Total, \$.....

Less \$.....

Net risk, \$.....'

Re-ins. in .....

WILLIAM STODDART, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith as follows,—

**First Interrogatory:**

Please state your name, age, place of residence and occupation.

**Answer to First Interrogatory:**

My name is William Stoddart; age sixty; place of residence, New York City in the State of New York, and by occupation I am a physician and surgeon, and a member of the Classification Committee at the Home Office of the New York Life Insurance Company in New York, the defendant.

**Second Interrogatory:**

Where and when were you educated as a physician and surgeon?

**Answer to Second Interrogatory:**

At the Medical Department of the University of the City of New York, where I was graduated as a physician and surgeon in the year 1873.

**Third Interrogatory:**

What has been your employment since your graduation in 1873 as a physician and surgeon?

**Answer to Third Interrogatory:**

The first five years after my graduation in 1873 I engaged in the general practice of my profession as a physician and surgeon. In 1880 I went into the employ of the New York Life Insurance Company and have been in its em-

ploy ever since continuously.

**Fourth Interrogatory:**

During your employment with the defendant what attention, if any, have you paid to the question of mortality and the effect of various ailments on the insurability of risks?

**Answer to Fourth Interrogatory:**

I have given a great deal of attention to that subject. In the first place as a physician and surgeon my education was along that line, and then in 1895 I took up special work with reference to the effect upon mortality of various ailments, and in 1904 I was made a member of the defendant's Classification Committee, the position which I still hold.

**Fifth Interrogatory:**

What are and since the year 1904 have been your duties as a member of the Classification Committee?

**Answer to Fifth Interrogatory:**

Under the Company's method of doing business it is, and during said time has been the practice to send the application, together with the applicant's declarations to the Company's Medical Examiner and the Medical Examiner's Report to the Medical Board for the action there of one of the Board, who, after considering the case, as shown by the papers, indicates what action the Company should take on the application by putting what we call a rating on the risk. For example,—an average risk is

rated by the Board at 100 per cent. Better than the average would be lower than one hundred, and if the Medical Board puts on a risk a rating above one hundred than it is not as good as the average. In all cases of applications for less than \$5,000 insurance this action of the Medical Board is the final action of the Company in accepting or rejecting the application, except in certain cases, but if an application is for \$5,000, or more, then under the rules and practice of the Company the papers are sent to the Classification Committee to be reviewed by that Committee for the purpose of seeing whether or not by the facts contained in the application and in the Medical Examiner's Report the risk is of the kind and character which the Company should accept in view of the amount of insurance applied for, and the Classification Committee has certain other duties with reference to reinstating policies, and the like.

#### Sixth Interrogatory:

You may state as to whether or not you as a member of the defendant's Classification Committee had anything to do with the action of the Company in accepting or rejecting the application of George Scott Moats, which is dated the 16th day of March, 1911, and is attached to the deposition of John C. McCall, in the case of Ida M. Moats against New York Life Insurance Company in this Court, and identi-

fied by him as McCall's Exhibit A, and for the purpose of answering the question you may examine said McCall's Exhibit A, and also McCall's Exhibit B, attached to his said deposition in said case, which is the defendant's Home Office memorandum, both of which said exhibits I now show you?

Answer to Sixth Interrogatory:

I did.

Seventh Interrogatory:

You may state what you did with reference to that application, when and where?

Answer to Seventh Interrogatory:

On the 24th day of March, 1911, McCall's Exhibit A, consisting of the application of George Scott Moats, including the declarations to the Company's Medical Examiner and the Medical Examiner's Report, which is on the reverse side of the declarations to the Medical Examiner, came into my hands as a member of the defendant's Classification Committee. I there examined the papers, read over the application, the declarations to the Medical Examiner and the Medical Examiner's Report, and those papers showed by the statements made therein that the applicant was a satisfactory risk for the amount of insurance applied for, and therefore I approved the application for the issuance of the amount of insurance applied for and at that time I made a memorandum of my action in that respect by making on McCall's



Exhibit B, which is the Company's original record of its action on McCall's Exhibit A, the following record, which is in my handwriting, except the part thereof that shows itself to be made by a stamp, namely, "Mar 24 Amt O K WS", which as extended and understood by the Company, reads as follows, "March 24, 1911, amount all right William Stoddart," and then I sent the papers on that date to the Company's Division of Policy Issues for the policy to be written up as applied for and forwarded for delivery.

**Eighth Interrogatory:**

You may state whether or not you have had any other employment since the year 1880 than as an employee of the defendant?

**Answer to Eighth Interrogatory:**

No.

**Ninth Interrogatory:**

In whose handwriting is that part of McCall's Exhibit B which contains what you say was a record of your action thereon?

**Answer to Ninth Interrogatory:**

It is in my handwriting except the part thereof that is made with a stamp, that is, the date.

**Tenth Interrogatory:**

Did you or not at that, or any other time, have before you, or consider any other papers, statements, or things whatsoever in acting upon McCall's Exhibit A, except the papers that constitute McCall's Exhibit A?

Answer to Tenth Interrogatory:

No.

Eleventh Interrogatory:

In approving the issuance of the policy for the amount applied for, state if you please, upon what you put your sole reliance?

Answer to Eleventh Interrogatory:

Solely upon McCall's Exhibit A, that is to say, in what is contained in the application and declarations made to the Medical Examiner and the Medical Examiner's Report.

Twelfth Interrogatory:

You may state whether or not in acting upon McCall's Exhibit A in the way you have stated you believed each and all the statements therein contained to be full, complete and true?

Answer to Twelfth Interrogatory:

I did.

Thirteenth Interrogatory:

Upon what, if you know, did the defendant base its acceptance of Mr. Moats' application, McCall's Exhibit A?

Answer to Thirteenth Interrogatory:

Solely upon the belief that the statements contained in McCall's Exhibit A were full, complete and true as they are therein claimed to be.

Fourteenth Interrogatory:

Suppose Mr. Moats in his declarations to the Medical Examiner, which forms a part of McCall's Exhibit A, had said in answer to Ques-

tion No. 11 that he had consulted a physician that day for insomnia and nervousness, giving the name of the physician whom he had consulted, would you or not have approved the application for the issuance of these policies?

Answer to Fourteenth Interrogatory:

No.

Fifteenth Interrogatory:

Suppose Mr. Moats in answer to Question 9 in his declarations to the Medical Examiner instead of answering "No" to the question as to whether or not he had ever suffered from any disease of the brain or nervous system had said in answer to that question that he was then suffering from insomnia and had been suffering from insomnia for some weeks past,—what effect, if any, would such answer have had on the defendant's action on McCall's Exhibit A?

Answer to Fifteenth Interrogatory:

It would not have accepted the application.

Sixteenth Interrogatory:

Why?

Answer to Sixteenth Interrogatory:

The application called for a policy that necessitated the very best class of risk. Insomnia and nervousness are serious ailments in considering an application for insurance for no one can tell what the result of insomnia and nervousness may be. Sometimes it leads to suicide or to insanity, or to other calamity, and some-

times it is an important symptom of serious disease, and where an applicant is suffering from insomnia he is simply not insurable.

**Seventeenth Interrogatory:**

You may state whether or not you are familiar with the practice, usage and custom of Life Insurance Companies generally in passing upon applications for insurance

**Answer to Seventeenth Interrogatory:**

Yes, I am.

**Eighteenth Interrogatory:**

How did you gain this familiarity

**Answer to Eighteenth Interrogatory:**

Because for more than thirty years I have been engaged solely in the life insurance business and my employment at the Home Office of the Company has brought me in touch with the life insurance business generally, and the practice of Life Insurance Companies generally on this subject.

**Nineteenth Interrogatory:**

You may state, if you know, as to whether or not there is any well defined practice, usage, or custom among Life Insurance Companies generally as to their action on applications for insurance, which show that at the time of the application the applicant is suffering from insomnia.

**Answer to Nineteenth Interrogatory:**

There is.

**Twentieth Interrogatory:**

What is that practice or custom?

**Answer to Twentieth Interrogatory:**

It is a universal practice not to accept an application where it is disclosed to the Company that the applicant is suffering from insomnia.

**Twenty-first Interrogatory:**

Suppose an application showed that on the date of the application, and before the application was signed the applicant had consulted a physician for nervousness and insomnia and showed that for a period of some time before the date of the application, say four, five or six weeks, the applicant had been nervous and excitable and had attended religious meetings at which he made excessive demonstrations of religious enthusiasm,—how, if at all, would such showing affect the action of an Insurance Company in passing upon the application for insurance?

**Answer to Twenty-first Interrogatory:**

Where such facts were shown an Insurance Company would decline the application. No Company that I know of would accept an application for insurance where such facts were shown.

**Twenty-second Interrogatory:**

Suppose that Mr. Moats in his declarations to the Company's Medical Examiner, as shown by McCall's Exhibit A, instead of answering "No" to the following Question No. 9, namely,



"Have you ever had or suffered from any of the following diseases, A: Of the brain or nervous system" had answered "Yes" to that question, and under the heading, "Name of diseases, had written "Insomnia", and under the heading "Number of attacks", appropriate language showing that he had suffered for some time from insomnia, and had given the date of his insomnia showing that he had suffered therefrom for some time, and under the heading "Results" had said he was still suffering, would or would not the defendant have accepted his application?

Answer to Twenty-second Interrogatory:

It would not have accepted it.

WILLIAM STODDART.

Subscribed in my presence and sworn to before me this 15th day of May, 1912.

[Seal.] LOUIS H. COOKE,

Notary Public, New York County, No. 108, and New York Register No. 4032.

My Commission Expires March 30, 1914.

STATE, COUNTY and  
City of New York—ss.

I, LOUIS H. COOKE, a Notary Public duly commissioned and qualified for, and residing in said County and State, do hereby certify that the above depositions of Calvin L. Harrison and William Stoddart were duly taken before me, pursuant to the annexed notice, at my office, 346 Broadway, in the City

of New York and State of New York, on the 15th day of May, 1912, at eleven o'clock A. M., and that said witnesses were each there and then by me duly and severally, carefully examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and after being so sworn, they each gave their depositions as above shown; that their said depositions were taken down in shorthand under my personal supervision by Ida Taylor, who is not attorney or relative of either party, or otherwise interested in the event of said suit, and were by her duly reduced to typewriting from her shorthand notes in my presence and under my personal supervision; that thereupon each of said witnesses read over his said deposition in my presence and there and then subscribed and swore to the same; that said depositions were retained by me in my possession until they were, and they were by me duly sealed up, endorsed, addressed and transmitted to the Clerk of said Court; that I am not attorney or relative of either party, or otherwise interested in the event of said suit; that the reason for taking said depositions is, and the fact is, that each of said witnesses reside in the State of New York, more than one hundred miles from the place of the trial of said cause.

IN WITNESS WHEREOF I have hereunto set my hand and notarial seal at the City of New York this 15th day of May, 1912.

LOUIS H. COOKE,  
Notary Public.

[Seal.]

Notary Public, New York County, No. 108; and  
New York Register No. 4032.

My Commission Expires March 30, 1914.

Cost of taking these depositions \$30 paid by defendant.

LOUIS H. COOKE,

Notary Public, New York County, No. 108; and  
New York Register No. 4032.

My Commission Expires March 30, 1914.

Mr. MONTGOMERY: If the Court please, there  
is another deposition of equal length with this to be  
read.

COURT: Is that all the testimony you will have?

Mr. PLATT: Not quite all.

Mr. MONTGOMERY:

Whereupon proceedings here adjourned until Wednesday, May 29, 1912, 10 A. M.

Pendleton, Oregon, Wednesday, May 29, 1912,  
10 A. M.

Mr. COCHRAN: Was the offer of certified copy  
of the record of the Insane Asylum passed upon?  
(Page 81).

COURT: No, it was not passed upon. I have not  
been able to find any statute requiring that kind of a  
record to be kept. There may be one.

Mr. COCHRAN: I made a search through the  
record, and am unable to find one.

Mr. PLATT: We will state to your Honor our position on it. It is a close question. The statute creating the Board of Trustees of the Insane Asylum and

defining their authority, says: "They shall have power to govern, manage and administer the affairs of the asylum; make and adopt by-laws for their government, and the government of the asylum; they shall appoint all officers and employes of the asylum, prescribe their duties and remove them, when in their judgment the good of the public service requires it; they shall cause to be kept a full and correct record of their proceedings, which shall be open at all times to the inspection of any citizen desiring to examine the same; they shall hold stated meetings at the seat of government monthly; a majority of the board shall constitute a quorum to do business; they shall visit the asylum once in three months; and keep themselves constantly advised of all items of labor and expense, and the condition of the buildings and property of the asylum; they shall submit, to the legislative assembly, biennially, on or before the fourth day preceding the regular session of the legislature, a report showing the receipts and expenditures, the general condition of the asylum, the number of patients under treatment." Then follows the section with reference to appointment of superintendent and assistant, defining the number, the authority and the salaries. "Their duties not specified by law," says the closing sentence, "shall be prescribed in the by-laws of the Board of Trustees". And again in defining the authorities and duties of the superintendent: "He shall maintain discipline among the subordinate officers and employes"; that is, enforce obedience to laws, rules and regulations adopted for the government of the insti-

tution. "He shall estimate and report to the Board of Trustees with reference to all amounts of supplies. Section 4432: "The superintendent shall cause accurate and careful accounts to be kept of the daily expenditures, of all articles of stores and property placed in his charge, and shall, at the end of each month, submit the same to the Board of Trustees for their inspection, and on each daily report shall be shown the number of persons fed and lodged in the asylum, whether as officers, employee, or patient. A monthly report of the same character shall be made to the trustees." Then at the time of receiving patients from the county courts, he is required to make entries, and at the time of a discharge of any person committed to the insane asylum, the superintendent shall at once notify the county court of such discharge, and the date and cause thereof, and it shall be the duty of the superintendent to keep a record of those patients who are required to pay the minimum amount of \$10 per month, and so on. So that it seems to be fairly contemplated under the general provisions of this statute that records shall be kept. All that there is in this record is the date of the receipt of the patient, and from what locality he came, by whom he was committed, on the two several occasions, and that seems to be fairly within the record that is required to be kept.

COURT: Is that all that is in that record?

Mr. PLATT: That is all, and what disease he was suffering from. That seems to be fairly within the record that is required by this statute—just a skeleton of the commitment.



Mr. COCHRAN: The view the plaintiff takes of that situation is that it is a matter of convenience, and will be controlled by statutes relating to rules of evidence. Our statute provides that public records can be proved in a certain way, but I know of no statute which allows a man to make a certified copy of a record which he has made, whether it be in due course of business or not, and that certified copy admissible in evidence. We might as well allow a person—a book-keeper for example—to make a certified copy of an entry in his book, and introduce the certified copy as competent evidence. It would clearly be hearsay. \* \* \*

COURT: I suppose that the records kept at Salem, in the regular course of the administration of that institution, showing the receipt of the patient and the date of his discharge would probably, under this statute, be a public record of a board or department of the government, that might be proven in the manner provided by statute, and, therefore, inasmuch as this is nothing more than a record of the date of the receipt, and the date of the discharge of the patient and the diseases from which he was suffering, it is competent evidence for that purpose. If there are any other statements in it of conclusions that are not required to be made a part of the record, that ought not to be considered. I haven't examined it to see. For the purpose of showing the date of the receipt of the patient, and of his discharge, it will be admitted. It simply supplements the oral testimony that has already been given in the case.

Record marked "Defendant's Exhibit E."

Mr. COCHRAN: It seems, your Honor, to largely supplement that which is already in. As far as the personal history or record is concerned, I think it would be hearsay.

COURT: If there is anything of that kind, it will not be considered as testimony in this case.

Mr. PLATT: I am willing it should be limited by the Court's ruling.

COURT: Very well, then, it will be admitted for the purpose of showing the date of his receipt and his discharge.

Whereupon the following, which is a copy of Exhibit E was received in evidence and read:

Mr. MONTGOMERY:

"Admission Record—Males.

April 18, 1911. George S. Moats.

Nativity: Illinois.

From Multnomah County: Age 33 years; married; Farmer.

Cause of Insanity, Unknown. Remarks, Mountain View, 10 days.

Second Admission.

June 11, 1911; George S. Moats.

Nativity, Illinois; from Marion County; Age 33; married; farmer..

Cause of Insanity——

Mr. MONTGOMERY: I suppose the ruling of your Honor applies to the cause of insanity?

COURT: Yes, I think so.

Mr. MONTGOMERY: I will omit the personal history.

\* \* \* \* \*

"Death Record, Book G, O. S. I. A.

June 14, 1911. Name, George Moats; Nativity, Illinois; Committed from Marion County, June 11, 1911; Cause of death, maniacal exhaustion; sent to La Grande.

I, R. Lee Steiner, the duly appointed and regularly acting superintendent of the Oregon State Insane Asylum do hereby certify that I have prepared the within copy of the records of the Oregon State Insane Asylum, and have duly compared said copy of records with the original of said records, and that said copy is a true, complete and correct transcript of said original records, and of the whole thereof, and that there is no seal of said office of medical, superintendent, and that the said medical superintendent has no seal of office or official seal.

Dated at Salem, Oregon, this 29th day of March, 1912.

R. E. LEE STEINER,

Medical Superintendent of the Oregon State Insane Asylum.

We, Oswald West, Governor of the State of Oregon, Ben W. Olcott, Secretary of State of the State of Oregon, and Thomas B. Kay, Treasurer of the State of Oregon, and ex-officio trustees of the Oregon State Insane Asylum, do hereby certify that we have compared the within copy of the records of the Oregon State Insane Asylum with the original record

thereof, and that said copy of said original records, is a true, complete and correct transcript of said original records, and of the whole thereof, and that there is no seal of said office of medical superintendent, and that the said medical superintendent has no seal of office or official seal; and said office of trustee has no official seal.

OSWALD WEST,

Governor of the State of Oregon and ex-officio trustee of the Oregon State Insane Asylum.

BEN W. OLCOTT,

Secretary of State of the State of Oregon, and ex-officio trustee of the Oregon State Insane Asylum.

THOMAS B. KAY,

Treasurer of the State of Oregon and ex-officio trustee of the Oregon State Insane Asylum.

UNITED STATES OF AMERICA,

State of Oregon.

Office of the Secretary of State.

I, Ben W. Olcott, Secretary of State of the State of Oregon, and custodian of the seal of said State, do hereby certify:

That the above named R. E. Lee Steiner, is and has been during the year 1912, the duly appointed and regularly acting medical superintendent of the Oregon State Insane Asylum in said State of Oregon, and the keeper of the records and office books kept in the office of the medical superintendent of the said Oregon State Insane Asylum, a public office, not appertaining to a court.

I do further certify that there is no seal of said of-

fice of Medical Superintendent of the Oregon State Insane Asylum, and the said Medical Superintendent has no seal of office or official seal.

I do further certify that the foregoing attestation of the said R. E. Lee Steiner is in due form and by the proper officer.

I do further certify that the above-named Oswald West, Governor of the State of Oregon, Ben W. Olcott, Secretary of State of the State of Oregon, and Thomas B. Kay, Treasurer of the State of Oregon, are and have been, during the year 1912, the duly qualified and regularly acting trustees of the Oregon State Insane Asylum, and that the foregoing attestation of said Oswald West, Governor of the State of Oregon, Ben W. Olcott, Secretary of State of the State of Oregon, and Thomas B. Kay, Treasurer of the State of Oregon, are in due form and by the proper officers, and that there is no seal of said office of trustee of the Oregon State Insane Asylum, and that the said office of trustee of the Oregon State Insane Asylum has no seal of office or official seal.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the seal of the State of Oregon.

Done at the Capitol at Salem, Oregon, this 26th day of April, A. D., 1912.

[Seal.]

BEN W. OLCOTT,

Secretary of State.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

Mr. MONTGOMERY: I will now proceed with



the reading of the deposition of William Stoddard.

The Stoddard deposition read in evidence and no exception noted.

(See deposition defendant's Exhibit F.)

Mr. MONTGOMERY: If the court please, we have made duplicate copies, or rather there were two separate depositions taken at the time in each case, and for the purpose of preserving the record, I would like to have one copy, which is in the Ida Moats case, and one copy which is in the Ida Moats, Guardian, case, both introduced.

F. H. DRAKE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. MONTGOMERY):

Q. You are the deputy clerk of this court?

A. Yes, sir.

Q. I now direct your attention to what purports to be a receipt, and ask you if that is your signature as such deputy clerk?

A. Yes sir.

Mr. MONTGOMERY: I want to offer in evidence a receipt signed by A. M. Cannon, Clerk of United States Court, in and for the District of Oregon, signed by Fred H. Drake, deputy clerk, showing the payment into this court of the sum of \$287.78, being the amount of premium and interest thereon, paid by George Scott Moats to the New York Life Insurance Company, and will ask that the same be received and marked as de-

fendant's exhibit.

Mr. COCHRAN: Was this money paid to you, Mr. Drake?

A. Yes, sir.

Mr. COCHRAN: Where?

A. Pendleton.

Mr. COCHRAN: When?

A. Monday morning—last Monday morning, May 27th.

Mr. COCHRAN: Before or after the trial started?

A. Before.

Mr. COCHRAN: We desire to object to any recitals in the offer. These are quite immaterial, outside of the fact that he got so much money.

COURT: You may read the receipt for the money. The objection is overruled.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

Document marked "Defendant's Exhibit G", and read as follows:

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, and IDA M. MOATS, Guardian  
of the person and estate of George Albert  
Moats, a minor,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

RECEIPT.

This is to certify that I have this day received from the New York Life Insurance Company, defendant in the above entitled cause the sum of \$287.78, being the alleged amount of premiums paid by George Scott Moats, deceased, upon the alleged policies of insurance now being sued upon in the cause of Ida M. Moats, Plaintiff, vs. New York Life Insurance Company, a corporation, defendant, and Ida M. Moats, Guardian of the person and estate of George A. Moats a minor, plaintiff, vs. New York Life Insurance Company, defendant, being the amount of money hereby tendered to the plaintiffs in the said cases by the said defendants, in accordance with its act of rescission of the said alleged contract, including alleged interest on said total from March 16, 1911, to May 27, 1912.

A. M. CANNON,

Clerk of the United States District Court, in and for the District of Oregon.

By Fred H. Drake, Deputy Clerk.

Mr. COCHRAN: The objection is overruled?

COURT: Yes, the objection is overruled. Indeed, I think the courts have held it is not necessary to tender return premium to make a defense of this kind. They have in fire policies, and I think the Federal courts have held.

Mr. PLATT: I think that is probably true, but in an excess of caution, we paid the money.

Witness excused.

Mr. PLATT: If your Honor please, we are ready to close at this point, with the exception of one wit-

ness who hasn't arrived here yet, and we would like the privilege of calling him whenever he gets here, if the case is still in progress.

COURT: If the case isn't closed?

Mr. PLATT: If the case isn't closed.

COURT: Very well.

Mr. PLATT: With that understanding, Defendant rests.

Defendant Rests.

Whereupon the plaintiff offered the testimony of the following witnesses in rebuttal.

MRS. IDA M. MOATS. Recalled by the plaintiff in rebuttal.

Direct Examination.

(Questions by Mr. COCHRAN):

Q. Mrs. Moats, how long have you lived in Union County?

A. Twenty—about twenty-six years, I think. 26 years, as near as I can remember.

Q. Let's have the answer again?

A. 26 years, as near as I can remember.

COURT: You will have to speak loud enough so the jury can hear you.

A. 26 years.

Q. How far do you live from Summerville?

A. A mile and a quarter.

Q. In which direction?

A. South.

Q. How long have you lived there?

A. Well, I have lived there about 26 years, be-

cause we lived on another farm just a very short time until we moved to where we are now.

Q. Mr. Moats is your second husband?

A. Yes.

Q. Did you have children by your first husband?

A. Yes.

Q. If so, what were their names?

A. Frank, Mamie and Charley.

Q. Are they all living?

A. No, Charley is dead.

Q. When were you and Mr. Moats married?

A. We were married on the 22nd day of January, 11 years ago.

Q. Were there children born to that marriage?

A. Two.

Q. What were their names?

A. George and Geraldine.

Q. Is George—is his name George Albert Moats?

A. George Albert Moats.

Q. How old is he?

A. He is past nine.

Q. That is him sitting right here, is it?

A. Yes.

Q. Geraldine—is she living?

A. Geraldine is dead.

Q. How old would she have been if living today?

A. She would have been seven—seven last November.

Q. Are those the only children born to the marriage?

A. Yes.



Q. What persons have composed your family previous to the death of Mr. Moats?

A. You mean my immediate family?

Q. Your immediate family.

A. My father, mother, and my two brothers.

Q. No, I mean who lived with you in your immediate family?

A. Well, my two brothers lived with me. They don't live with me now, but they did after I was married, the first time I left home. They are not with me now.

Q. And who was living with you for the year previous to Mr. Moats' death?

A. Well not—only just my family.

Q. And what were their names?

A. Minnie, Charley and Frank.

Q. Were any of them married recently?

A. Yes.

Q. Which one?

A. Frank.

Q. And when was he married?

A. He was married last February—yes, last February—February, I think—February, I am sure.

Q. February a year ago. And since that time has he been living in the same house with you?

A. He was living in the same house with me until after I removed to La Grande, and I moved to La Grande some time in July. I don't remember just the date, and I left La Grande awhile, and I got so homesick to go back—I was so worried—

COURT: When did you go back?

A. In August. Then I moved in one house, and Frank in the other.

Q. That was July of what year?

A. 1911.

COURT: What year did you say it was?

A. 1911, just last year.

Q. What is the fact as to whether or not Mr. Moats was sort of a home man, as to whether he lived at home, and was inclined to stay at home when not away on business, or otherwise?

A. He was a home man. He was always at home unless business called him away.

Q. And what was the character of his and your associates?

A. Well, they were good.

Q. Now, coming to town upon your shopping business, what is the fact as to whether you went alone, or whether Mr. Moats would always go with you?

A. We were very seldom separated. We were always together. Mr. Moats always went with me, nearly, to town. I very seldom went alone, unless just to Summerville, but to La Grande he always went.

Q. Do you remember of an event of your being in La Grande upon the occasion of seeing Doctor Molitor?

A. Yes.

Q. Do you remember about when that was?

A. I don't just remember the date, but it was in the spring. I went to see him to consult myself, and

Mr. Moats was with me at the time.

Q. State whether or not Mr. Moats went to see Dr. Molitor to consult him for himself?

A. I do not know—not when I was with him, he didn't.

Q. State whether or not he did when you were with him?

A. He didn't that day I was with him. He went with me because I hadn't been very well. I was just getting over a severe illness, and he went with me, and my talk was with Dr. Molitor myself.

Q. What, if any, conversation did he have with him?

A. The only thing I remember was Doctor Molitor said something about his stomach being out of order, and he said, "I will tell you Mr. Moats, I very often myself miss a meal." And he says, "I think it does one good to miss a meal." I wasn't paying much attention, and they didn't have much conversation, because there was other patients waiting, and I didn't want to keep them waiting. We left very shortly afterwards.

Q. You may state whether or not that was the only time Mr. Moats saw Dr. Molitor in your presence?

A. No. One other time, about three years before that he went to see Dr. Molitor, and he wasn't to say sick, anything of that kind, but a kind of a pain across his back, and the doctor just gave him a very small prescription for that. He said it didn't amount to anything at all.

Q. Did you hear some testimony by a gentleman by the name of C. H. Upton yesterday?

A. I did.

Q. Are you acquainted with Dr. Upton?

A. I am.

Q. You may state whether or not Mr. Moats, together with yourself, called on Dr. Upton?

A. Yes.

Q. Do you know when it was?

A. It was—well, the very day that I went to consult Dr. Molitor about myself, we came directly from his office. We had heard that Dr. Upton was an eye specialist, and Mr. Moats had been having trouble with one of his eyes for about a week or two, and we came directly from Dr. Molitor's office to Dr. Upton's. That was the only time—the first trip and the last.

Q. What was the trouble with his eye?

A. Just a swelling underneath here. It didn't pain him, but he was anxious to find out what it was. I was present when the doctor examined his eye.

Q. What did the doctor do?

A. Well, he injected cocaine, I presume. I am not used to medical words, but presume it was cocaine. Something to ease the pain; something that wouldn't hurt him when he examined his eye—I judge cocaine. Just as soon as the medicine had time to take effect, he took a small instrument and he says, "Mrs. Moats, if you can stand it, come up here and notice what I am going to do." I says, "Yes, I can." I went up directly where I could see, and he took his lid up, and he

says, "Would you believe that was in there," and I says "No." He says, "There was a boy here yesterday. I took one off just like it," he says, "it don't amount to anything at all. I will take it off in a very few minutes." So he took an instrument after the medicine had time to take effect, he got another instrument, and he says, "Can you stand to see me take that off?" And I says, "Yes, I can stand to see it, if he can stand it being taken off." He says, "It won't pain a particle." I walked up and saw him take it off and put it in a piece of paper. And he says, "Mr. Moats, I don't think you will be bothered with that again". He gave him a small vial of iodine, and he says, "Put it on the eye, whether it bothers or not, it won't hurt anyway." My husband put on one application that I remember, and the bottle stood on the dresser, I don't know how long. Nobody used any more.

Q. What difficulty did it cause him?

A. Didn't cause him any. Just a small place below his eye. Didn't cause him any difficulty.

Q. Did the affection return any more?

A. No, never bothered him any more.

Q. State to the jury whether or not your husband there at the time consulted Dr. Upton for nervousness or sleeplessness?

A. There wasn't a thing mentioned about sleeplessness, about my husband's condition. The only thing that he done was taking that little lump, as he called it, off of his eye, and giving him this iodine, and he never examined him or spoke of nervousness—



nothing else mentioned but that.

Q. Tell the jury whether or not there was a discussion had on insurance?

A. There wasn't such a thing as insurance mentioned—not a thing of insurance mentioned. We did talk on eye subjects—his eye.

Q. State whether or not you inquired of Dr. Up-ton whether or not your husband was an insurable risk?

A. No, I didn't. I had no desire to ask any such a question. I never thought of it. There wasn't a thing about insurance mentioned while we was in the office. There was other patients waiting and we didn't want to keep them detained. There wasn't a thing even mentioned while we were in there. It was simply a consulting about his eye, and that was all there was to it.

Q. What has been the manner of life of your husband—what was his business?

A. Well, he was a merchant at one time. We had a farm rented out. He was a merchant at one time.

Q. Where?

A. Summerville.

Q. When did he dispose of that business?

A. It has been about, as near as I can remember, it has been about nine years ago.

Q. Where did you go then?

A. Right back to the farm.

Q. And what has been his business continuously since that time?

A. Farming.

Q. Did he engage in the farm work himself?

A. All the time, and managed all the time. He managed the farm all the time, and engaged in the work part of the time.

Q. State whether or not he did any during the month of March, 1911?

A. He did.

Q. What time did he arise in the morning?

A. Well, he was a pretty early riser. He generally got up at five o'clock—sometimes at half past four. He always was out at work early, and if he would come back and I didn't have breakfast quite ready, he would always assist me about the breakfast.

Q. And he would engage in the—personally in the manual labor incident to the farm, would he?

A. Yes, yes.

Q. You may state whether or not there was anything of a peculiar nature in his conduct, noticed by you, or observed by you previous to March 16, 1911.

A. None whatever. I never noticed anything peculiar, and I was with him constantly. Nothing at all that I could notice, anything strange at all about him. He was just as natural to me as he ever was. I never noticed anything.

Q. State whether or not he became at any time unduly excited from any cause?

A. No, he never.

Q. Did you have church services down there at Summerville about that time?

A. Yes, occasionally, just Sunday was all—same as any other town would have.

Q. Had you had any revival services earlier than that?

A. That was in February.

Q. What church was your husband a member of?

A. Methodist.

Q. And was he one of the officers of the church?

A. Yes, sir, he was superintendent of the Sunday school.

Q. What is the fact as to whether or not your husband was a consistent, earnest worker there in the church?

A. Yes, not any more than he was about anything else. Everything that he undertook to do, he generally done in earnest, because there wasn't anything half way about my husband.

Q. What was his manner of life and habits?

A. They were good—his habits were all good.

Q. Did he use intoxicating liquors?

A. No, sir.

Q. Tobacco in any form?

A. No, sir.

Q. What was his habit as to being tidy and polite?

A. Well, he was very proud of his personal appearance, and he was always polite—always.

Q. You may state whether or not you attended church with your husband?

A. I did.

Q. Did the rest of the family attend church with him?

A. Yes.

Q. Were you in position, and were you able to see your husband's conduct during all the time he was there at church?

A. I sung in the choir right where I had a view of my husband and the whole congregation, and especially him, for he never took a back seat.

Q. You may state whether or not there was any peculiarity about your husband, anything that would indicate undue excitement?

A. Never.

Q. After—say, during the month of March, 1911—did you go to La Grande on or about the 16th of March?

A. Yes.

Q. How did you go to La Grande?

A. We went in a buggy.

Q. And what kind of a team did you have?

A. Well, we had a workhorse and another one, when the roads were bad.

Q. You had an ordinary work team?

A. Yes.

Q. Was that team a team that you kept up and fed, or were they just——

A. No, sir, they had been running out in the straw.

Q. What were the condition of the roads, if you remember?

A. In places they were very bad.

Q. You say bad. In what way bad?

A. They were muddy and hard pulling.

Q. What time did you start to La Grande?

A. It was between eight and nine o'clock, because

I remember I remarked to my daughter—we never got up very early—I remarked to my daughter: “Mamie, we are getting an awfully late start to La Grande.”

Q. In driving to La Grande, state whether you went fast, slow or in the usual way consistent with the roads and the kind of a team you had?

A. No, we went rather too slow, because I remember I got so awfully tired. I remarked to my husband, “It seems like it takes us so long to get there today.” He says, “I don’t dare to drive fast, Ida, for we have just taken the team off the straw, and the roads are bad, and they can’t travel good.”

Q. What time did you arrive in La Grande?

A. Must have been between ten and eleven o’clock when we got there, because it wasn’t very long before lunch time.

Q. Upon arriving at La Grande, what did you do?

A. I think the first thing after we left the team at a livery stable, we went to N. K. West’s.

Q. What business is he in there?

A. Dry Goods store.

Q. How long did you stay, or for what purpose did you go there?

A. It took us some little time, for I wanted to get my daughter a pair of shoes, and I had to be careful the kind I selected.

Q. State whether or not your husband was with you constantly from the time you arrived at La Grande, up to the time of buying the shoes?

A. He was right there, for he selected the shoes



himself.

Q. Where did you and he go from there?

A. Went over to Mr. Miller's office—the real estate man.

Q. Who was he?

A. The real estate man there.

Q. An old acquaintance of yours?

A. Yes.

Q. For what purpose did you go there?

A. Well, he went up there to see if Mr. Lewis' office was by there.

Q. That is Mr. H. P. Lewis?

A. Yes.

Q. And for what purpose did you go to see Mr. H. P. Lewis?

A. Well, he wanted to consult him about life insurance.

Q. Did you see Mr. Lewis there?

A. No, Mr. Miller said that he was at home. He lived up in Old Town then, and he was at home. We would have to wait. If we waited awhile, perhaps he would come down.

Q. Were you informed as to when you could see him? Or what was done in the way of facilitating your seeing Mr. Lewis?

A. Well, we waited awhile until I commenced getting tired. My husband says, "Got a phone?" he says, yes, so we phoned him. He said then that he would be down after dinner—it was so near dinner time he would be down after dinner.

Q. What was done then?

A. We went from there to the restaurant and got our dinner.

Q. What restaurant did you go to?

A. The Palace.

Q. After dinner who did you see first?

A. After dinner we went back up to the office, and Mr. Lewis—Mr. Miller wasn't there yet. He hadn't come back from dinner. We waited awhile until he came. When he got in there, Mr. Lewis hadn't called yet. He says, "Wait a minute and I will phone again." So he phoned, and Mr. Lewis was on his way, so we waited until Mr. Lewis came.

Q. And did you—were you present while your husband and Mr. Lewis were talking?

A. I was in the room with them.

Q. What was done there?

A. Well, he just simply read about the policies.

Q. Did your husband sign the application at that time?

A. Not then, no.

Q. What did he do?

A. Well, he just talked over the matter with him, and Mr. Lewis told him that he ought—that he would like to have him take out a policy with him.

Q. I am not asking what was said, but what did you do? Did you go anywhere?

A. We went from there down to another insurance company.

Q. What was his name?

A. Logan—Ray Logan.

Q. And what did you do after that?

A. Well, my husband talked with him a few minutes, and he came right out and went right back to the place where Mr. Lewis was again.

Q. What was done then?

A. Then him and Mr. Leiws made out a contract, and took out a policy.

Q. Where did your husband go then?

A. Shall I tell what he said to me? I couldn't go with him.

Q. I don't care for it. I doubt if it is material. If the other side cares, they can have it.

A. He went from there to the examining physician's office.

Q. What was his name?

A. Dr. Underwood.

Q. Did you go along?

A. No.

Q. What arrangement did you have with your husband as to where he would meet you?

A. He says, "If you have any shopping to do," he says, "you go and do it, while I go to the examining physician's office. Be sure and let me know where I can find you." I told him to go to Miss Wellman's department store, and I would be there.

Q. Where is Miss Wellman's store from Dr. Underwood's office?

A. Almost directly across the street. I went there.

Q. Did you go along with your husband any distance, or drive to Dr. Underwood's?

A. I walked down to the corner just a few doors

from where he had to go, then went on down to Miss Wellman's, and Mr. Lewis was with him at the time.

Q. Can you tell the jury whether or not your husband came directly over to where you were when he got through with Dr. Underwood?

A. Yes, he came across the street, right directly across the street and came right in to Miss Wellman's where I was at.

Q. What did you do then

A. Well, I just—you mean what I——

Q. You and him together. What did you do? Where did you go?

A. I went from there to Mr. West's again. I had some more shopping to do, and he went with me to Mr. West's.

Q. And following that, where did you go?

A. I think I went and got ice cream. My husband loved ice cream, and I think I went and got ice cream.

Q. After that.

A. I think we went down and got our team to go home, because my husband says, "we have to drive so slowly, we have to get an early start." He says, "I can't put the team through, the roads are so bad."

Q. Did you see Dr. Loughlin on that day?

A. No.

Mr. PLATT: Objected to, if your Honor please, on the ground that the proof of loss which this beneficiary has made to this company shows that Doctor Loughlin was consulted on this same date by deceased, and this is an attempt to contradict their own admission. 53 Oregon and other cases hold that you

cannot combat your own sworn admissions to a life insurance company.

COURT: Did Mrs. Moats swear to that?

Mr. PLATT: In her proof of loss as beneficiary.

COURT: Are they sworn to by her?

Mr. PLATT: Not sworn to by her, but sworn to and advanced primarily as a basis for recovery, and these proofs of loss show that Dr. Loughlin was consulted by Mr. Moats on the 16th day of March, 1911, for sleeplessness and nervousness.

Mr. COCHRAN: In this case here, each of these statements are independent, and the doctor has fixed March 16th as the date when he examined Mr. Moats, before the issuance of the policy. Now, we are attempting to show, and will show, that the doctor saw him after the policies—after the examination.

COURT: Let me see that.

Mr. PLATT: If your Honor pleases, this witness having adopted this proof of loss as her presentation of this case, having solemnly admitted that, she cannot dispute that now. It might be *prima facie* as to some other witness, but not as to her; and furthermore, they were admitted in evidence here.

COURT: Well, I haven't time to examine this question, but my impressions are that since this proof of death was made after the death, and as a basis of a claim under the policy, that the parties are not estopped from a statement to show that they were mistaken. If it is true they were mistaken. That would be my impression about it, because it isn't a matter upon which the company issued a policy. They



didn't base their action upon that. Of course, if she has made statements in here that contradict the testimony given on the stand, it will be for the jury to determine which is probably true, but I think she has a right to explain how her statements came to be made, if there is such a statement here, and I shall admit the testimony.

Mr. PLATT: Save an exception.

COURT: The exception is allowed.

Q. When did you see Dr. Loughlin?

A. I never saw Dr. Loughlin until after that day.

Q. And just when was it, please?

A. Well, it was one day some time after that. I don't just remember how long, but it was the same time that my husband—that I was with him—went to see him up at his office.

COURT: About how many days?

A. Well, I couldn't just enumerated them, but it was some time after that, for we did not go back to La Grande for several days after that.

COURT: You know when he was taken to Portland?

A. That was——

COURT: The 21st of March.

A. Yes. Yes. Well, we saw Dr. Loughlin—was it that morning? It seems to me it was that morning he saw Dr. Loughlin.

Q. The morning, the evening of which he went to Portland?

A. Yes. Dr. Loughlin went to Portland with him that night.

Q. Tell the jury about your husband's ability to sleep.

A. I hadn't heard any complaint about his sleeping, as I know he was a good sleeper. He was a much better sleeper than I was, for anything that would wake me up, generally he would sleep sound through, and I never heard him complain very much of sleeplessness until after he went down to the sanitarium.

Q. Did you go to Portland with him the first time?

A. No, no, I never went the first time.

Q. Now, did you go down the second time?

A. No, no, I didn't go down the second time.

Q. Tell the jury about—tell the jury whether or not you went down to Portland with your husband about the 10th of April, at the time when Dr. Tamiesie said he was on the train?

A. No, I wasn't with him.

Q. Who went with him?

A. Frank and his wife.

Q. That is your son?

A. Yes.

Q. And your son's wife?

A. Wife, yes.

Q. Are you acquainted with G. W. Zimmerman, an osteopath?

A. I never met him but one time.

Q. When was that?

A. That was the time—I don't remember the date of that, but it was one time I was up there with him—with my husband.

Q. State whether or not it was after the time your husband was examined by Dr. Underwood for life insurance.

A. He wasn't examined by Dr. Zimmerman for life insurance.

Q. No, I said after the time he was examined by Dr. Underwood for life insurance.

A. Oh, well, it was some time after that—some time after that.

'Q. Were you present at the time he was examined?

A. I was.

Q. Tell the jury whether or not Dr. Zimmerman had him take off his shirts and disclose his naked back?

A. No, the only thing he requested him to do was to remove his coat and vest, and his top shirt—that was all.

'Q. What did the doctor do with him

A. He just simply put him on the table, and rubbed his back a little bit.

Q. What complaint, if any did your husband make?

A. He never made any complaint.

Q. State whether or not he complained of the muscles of the neck hurting him ?

A. He never complained at all—never complained of anything.

Q. What was his conduct, as to whether or not he was restless?

A. He wasn't restless on the table. He laid per-

fectly quiet.

Q. How long was the doctor examining him?

A. He couldn't have been at the office more than half an hour, because it was almost five o'clock—getting late, almost supper time. He wasn't but a few minutes. I didn't think he made much of an examination at all, and I was present all the time.

Q. What was the doctor doing mostly?

A. He was talking on a conversation that wasn't my husband by any means. ..

Q. Talking about his other business, about how busy he was?

A. Talking about other patients that he had.

Q. Now, have you seen your husband's back, that is, his naked back, during—at or about that time?

A. Yes.

Q. Tell the jury whether or not the muscles of his entire back were contracted in any way?

A. I didn't see anything wrong with his back—not anything. He was simply perfect—nothing wrong with his back. He never complained of anything being wrong with his back.

Q. State whether or not he told Dr. Zimmerman that he was very nervous and could not sleep?

A. He never told Dr. Zimmerman very much of anything. Very few words were said between them, and I asked the doctor myself what they treated on, and he said mostly they treated on the back, and he commenced to explain about the nerves of the back, how they would do, and I didn't know anything about osteopathic work myself, but it didn't interest me

very much, and I didn't say very much about it, and my husband didn't.

Q. State whether or not Dr. Zimmerman said to your husband that his condition was a condition of growth lasting over a very considerable time.

A. There wasn't such a thing as growth mentioned—not a thing. He never mentioned about a growth. He simply told him that if he would let him treat him, he would make a well man of him.

Q. State whether or not your husband had any anxious expression on his face?

A. I never noticed any—nothing more than he usually had—that day.

Q. State whether or not he was any different that day from what he had been previously.

A. He hadn't been any different that day to what he had been.

Q. What was his condition previously, as to being normal?

A. Well, he was more of a quiet type than I was. I was more nervous than he was. I never noticed anything nervous.

Q. State whether or not he told Dr. Zimmerman that he was worried.

A. He never in my presence.

Q. State whether or not your husband's business affairs in any respect caused him worry?

A. He never had anything to cause him worry that I ever knew, any more than any other farmer had. He was a good manager, and always knew how to manage everything. He was a man that never



worried much about anything.

Q. Tell the jury what about that warning that Dr. Zimmerman gave as there only going to be two endings of your husband, insanity or death.

A. I never heard anything about insanity or death mentioned in my presence, and I was with him all the time. He never mentioned such a thing to my husband. He only told him, "If you take treatments of me a few times, I will make a well man of you." That is what he said. No such words as death or insanity mentioned in my presence.

Cross Examination.

(Questions by Mr. PLATT):

Q. Mrs. Moats, what did you and your husband go to Dr. Zimmerman's office for?

A. My husband went to see just what osteopathic work would do.

Q. Do for what?

A. He never had attended an osteopath's work, and he just wanted to see what their treatment was.

Q. Do for what?

A. Well, for anything.

Q. You just went there out of idle curiosity, is that it?

A. More than anything else. There really was nothing the matter with the man at the time.

Q. Now, you say your husband had never suffered from sleeplessness

A. Not to amount to anything at all, no, sir.

Q. What did he go to the Waverly Sanitarium for?

A. Well, he just simply went on Dr. Loughlin's orders is all. Dr. Loughlin just kind of persuaded him to go. He didn't go on my words, or his own.

Q. He didn't think it was necessary, but Dr. Loughlin urged him to go?

A. No, my husband didn't really think it was necessary, and I didn't think it was at the time.

Q. What did he consult Dr. Loughlin for?

A. Well, he said that his stomach was slightly deranged, and Dr. Loughlin said so himself, and he says, "I will give you something." He says,—this was after his life was insured that we went to see Dr. Loughlin at all. He says, "I will give you something." He never even examined him. He says, "I will give you a little bottle of medicine I think will straighten you out all right, and that will help your stomach and will digest your food."

Q. So he went down to the Mountain View Sanitarium, an institution for nervous and mental diseases, for an ailment of the stomach, did he ?

A. Well he went down there to be treated.

Q. For his stomach?

A. Well, I presume his stomach was included in it.

Q. What else did he go for beside his stomach?

A. I never asked him.

Q. Now, as I understand you, you wish the jury to understand that you and your husband did not consult Dr. Molitor on the third day of March, 1911, for nervousness and sleeplessness from which your

husband was suffering?

A. No, sir. No, sir, we never.

Q. And you also wish the jury to understand that you and your husband did not consult Dr. Molitor on the 14th day of March, 1911, for nervousness and sleeplessness from which your husband was suffering?

A. No, sir, we never.

Q. You also wish the jury to understand that you and your husband did not consult Dr. Upton upon the day that you fixed in the middle of March, prior to the life insurance incident?

A. No, sir.

Q. For nervousness and sleeplessness?

A. No, sir, we never.

Q. And you also wish the jury to understand that you and your husband did not consult Dr. Loughlin on the morning of the 16th of March, 1911, for nervousness and sleeplessness?

A. No, sir.

Q. From which your husband was suffering?

A. No, sir, we never.

Q. And you also wish the jury to understand that you and your husband did not consult Dr. Zimmerman on the 18th of March, for nervousness and sleeplessness from which your husband was suffering?

A. No, sir, we never.

Mr. PLATT: That is all.

Witness excused.

WILLIAM R. CHATTIN, a witness called on be-

half of the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. COCHRAN):

Q. Where do you live?

A. I live at Summerville.

Q. How long have you lived at Summerville?

A. Well, with the exception of a few years of absence, in the meantime, I have lived there 40 years.

Q. What has been your business during the past ten or fifteen years, or at least while you were active?

A. In my most active life I was a brick-layer, and since retiring from that, I have been cutting meat in a small meat shop—had a small business.

Q. Are you in business with anybody?

A. No, not connected—only as a helper.

Q. For whom?

A. For my boys, or my boy.

Q. Your son Willie Chattin. Did you know George Scott Moats in his life time?

A. Yes, sir.

Q. How intimately were you acquainted with him?

A. Quite intimately acquainted.

Q. Describe to the jury his appearance as to whether or not he complained of any ailment, or looked as though he was ill, or nervous, or weak?

A. He was a very stout looking man, and was gentlemanly in his conduct, and upright in every respect, as far as I could see or learn in regard to him.

Q. Did he hold any position in the Sunday school there?

A. He was superintendent of the Sunday school.

Q. Were you present at the Sunday school?

A. Yes, sir.

Q. What office did you hold?

A. Why—while he was superintendent the last—in the last year I had no office except treasurer and teacher.

Q. Do you know where George Moats was on the 12th of March, 1911?

A. He was at Sunday school.

Q. What day was that—what day of the week was that?

A. It was on Sunday.

Q. Did you notice anything about him that day peculiar in any respect?

A. No, he was all right.

Q. Are you acquainted with his general reputation in the community where he resided for being an honest, upright man?

A. It is good.

Q. Tell me whether you are acquainted or not?

A. How is that?

Q. Tell me whether you are acquainted with it or not?

A. I am acquainted, yes.

Q. Tell the jury what it is—good or bad?

A. His reputation, his character and all was good in the community in which he and I lived.

Q. Do you know the distance between Summer-



ville and La Grande? State if you know?

A. About 17 miles.

Q. Are you familiar with the condition of the roads during the month of March of each year, and particularly last year, from Summerville to La Grande?

A. Well, the roads are bad.

Q. In what way are they bad?

A. They are muddy and—muddy.

Q. Describe them—are they slick?

A. Well, in some places they are slick and some places——

Q. Have you travelled from Summerville to La Grande in the month of March, since you have been in Union County these 43 years

A. Oh, I suppose—I couldn't say particularly whether I ever in the month of March, but I suppose I have been every month of the year all right.

Q. What experience have you had in handling horses, and especially work teams that have just been brought up out of the field where they have been running on straw during the winter?

A. Well, they——

Q. Have you been with them more or less?

A. Have to be favored more or less.

Q. Tell the jury how long in your opinion, one travelling in the usual course over those muddy roads—bad roads, during the month of March, about how long it would take to drive to La Grande from Mrs. Moats' place through?

A. Well, it would take about—well, I would say

something more than two hours anyway.

Q. Well, how many miles an hour do you think would be usual

A. Ordinarily a person drives about ten miles an hour, but when the roads are muddy, I think six miles would be a fair drive for horses that were taken up and, considering driving the horses.

Cross Examination.

(Questions by Mr. PLATT):

Q. When the farmers come to town to shop, they make a pretty early start, do they not, Mr. Chattin, as a rule?

Mr. COCHRAN: Objected to as immaterial, and not cross examination.

A. I don't know——

COURT: I think it is competent. You asked about the length of time it would take to drive.

Mr. COCHRAN: This refers to the time they started.

A. Yes, they start.

Witness excused.

JOHN H. NEWBILL. Called by the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. COCHRAN):

Q. What is your full name, please?

A. John H. Newbill.

Q. Where do you live, Mr. Newbill?

A. Summerville.

Q. How long have you lived there?

A. Between seven and eight years.

Q. Were you acquainted with George Scott Moats in his lifetime?

A. I was.

Q. How intimately had you known him?

A. Well, we were—we were particular friends.

Q. Had you seen him very often during the month of March and the month of February, 1911?

A. Yes, sir.

Q. State whether or not you attended church there in Summerville at the same time he was there?

A. I did.

Q. Tell the jury whether or not you noticed anything about him of a peculiar or uncommon nature or character in his conduct—or character?

A. I noticed nothing wrong about the man at all.

Q. Are you acquainted with his general reputation in that community as to being an honest and upright man?

A. I am.

Q. Tell the jury what it is—good or bad.

A. His reputation was good—no man could deny his honesty.

Q. State to the jury whether or not you know what the condition of the roads are from Summerville to La Grande in the springtime, more especially in the month of March?

A. Well, the roads are never good.

Q. In what condition are they?

A. Muddy.

Q. Have you handled horses much, particularly

the working class—work horses?

A. I have, yes, quite a bit.

Q. Have you ever traveled that road during the time when the roads were muddy?

A. No, I never, not when the roads were very muddy. I never did.

Q. Have you ever travelled any distance in that valley when the roads were muddy?

A. No, I never.

Q. Would you be able to state about how long it would take to drive from Summerville to La Grande, or from Mrs. Moats' place to La Grande, with a work team, on those muddy roads?

A. I know how long it takes me to drive a work team down there when it isn't muddy—it takes me three hours.

#### Cross Examination.

(Questions by Mr. PLATT):

Q. You had a pretty lively revival out there in February, 1911, did you not?

A. Well, we did, yes. We had a very nice meeting.

Q. Two evangelists there by the name of Ruth and Eliot?

A. Well, not both at the same time, no. They were both there, though, that winter and spring.

Q. How often did those meetings, during the time that revival was in progress, take place—every night?

A. During the revival, yes, sir, they were every night.

Q. And how long did they continue, how many weeks?

A. I am not able to say.

Q. Two or three weeks?

A. Something like three weeks, maybe four, I wouldn't say positive.

Q. And how many meetings every night?

A. How many meetings every night? One.

Q. Well, would they pull off an extra meeting afterwards, that always goes with a revival?

A. That is counted one meeting.

Q. But they had the first main meeting, and then the aftermeeting, as is the custom?

A. Usually. Not every night.

Q. Now, Mr. Moats was very much interested in that revival, was he not?

A. Mr. Moats was interested in Christian work, and to be sure to be interested in a revival.

Q. And he was there every night during that whole three or four weeks, was he not?

A. Well, I am not able to say as to that.

Q. Well, that is your best recollection, is it not?

A. Well, I know he was awful attentive to church, but I won't say whether he was there every night or not.

Q. Well, he was there at practically every one of those night meetings during those four weeks, was he not?

Mr. COCHRAN: It seems to me, that that question has been sufficiently answered, your Honor.

Q. Be frank with us, now, Mr. Newbill. Don't—



A. Well, there isn't any use to guess at anything.

Q. I am asking for your best recollection. Wasn't he there at practically every one of those meetings?

A. It seems to me like there was a meeting along towards the last that he wasn't there, but I wouldn't say positively. The first meeting, though, he was there.

Q. And he was there when the meeting begun, and he stayed until it ended—the second meeting each evening, did he not?

A. Yes, sir.

Q. And he took an active part in working among those who were the object of solicitude there, did he not?

A. He did.

Q. And did you ever hear him make a claim of being sanctified?

A. I have.

Q. How often during those four weeks' meetings?

A. I believe twice.

Q. Now, what did that consist of, when he claimed to be sanctified? What did he do and say?

A. Well, he didn't have a great lot to say about it. He believed he was saved and sanctified.

Q. Well, was that accompanied by an oral statement—an exclamation to that effect, in the presence of the meeting?

A. Yes, sir.

Q. To what extent? What would he say? Did he stand up in his place and deliver a little—a few remarks on the subject?

A. A few remarks, yes. He would rise and say a few remarks.

Q. He was rather an interesting speaker on religious subjects, was he not?

A. Well, yes.

Q. And expounded the Bible with fluency and with interest?

A. Yes, he took a great interest in the Bible.

Q. Now, were there any day meetings besides those night meetings.

A. Yes, sir.

Q. Were you at any of those?

A. I think two or three.

Q. Was Mr. Moats present?

A. He was one day, but I couldn't say to any more than that.

Q. Now, isn't it a fact, Mr. Newbill, that during that four weeks of those revivals he gave up practically his whole time to that work?

A. No, I couldn't say as to that.

Q. Wasn't he the moving influence that brought the revivalists there?

A. Well, he helped, yes. He had influence over bringing them.

Q. Didn't he contribute largely financially to their expenses—their being brought over there?

A. Yes, sir.

Q. He was, in other words, the moving spirit of that revival locally, was he not?

A. Yes, sir.

Witness excused.

Whereupon proceedings herein were adjourned until 2 P. M. Wednesday, May 29, 1912.

Pendleton, Oregon, Wednesday, May 29, 1912,  
2 P. M.

D. R. McKENZIE, a witness called by the plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. Cochran):

Q. What are your initials?

A. D. R. McKenzie.

Q. Where do you live?

A. In Summerville.

Q. How long have you lived there?

A. With the absence of three years have been there 22 years. I think it was. Been three years from the place.

Q. What is your business?

A. Postmaster.

Q. Postmaster. And did you ever—do you have any other business in connection therewith?

A. Yes, and general merchandise store.

Q. Were you acquainted with George Scott Moats in his lifetime?

A. I was.

Q. How long have you known him?

A. About 11 years, somewhere close to that time.

Q. Are you acquainted with his general reputation in the community where he resided?

A. I am.

Q. For honesty and uprightness of life?

A. I am.

Q. Tell the jury what it is.

A. Why, I consider it good. I hadn't heard any one say anything to the contrary.

Cross Examination.

(Questions by Mr. PLATT):

Q. Were you ever present—were you present at any of these revival meetings of the month of February, 1911?

A. I was.

Q. In your town?

A. I was.

Q. How frequently were you present?

Mr. COCHRAN: We object to this line of questions as not being cross examination.

COURT: It is not strictly cross examination. He didn't ask him anything about that.

Mr. PLATT: It bears on his general reputation.

COURT: I hardly see how it can affect his general reputation for honesty and integrity.

Mr. PLATT: That interrogatory was limited to his general reputation?

COURT: Yes.

Q. How often did you come in contact with Mr. Moats?

A. I couldn't exactly state how many times, but I have——

Q. I mean frequently, or occasionally?

A. Why, frequently, yes. I have been acquainted

with him ever since he came to the country.

Q. Where would you see him—at your store?

A. Yes, at my store, and he had run a store at one time, and I had been in his store.

Q. Did you ever see him any where else but those places?

A. Yes.

Q. Where?

A. His home.

Q. Where else?

A. At church.

Q. How often did you see him at church?

A. Well, I couldn't state as many times. It would be hard to recall the number of times in eleven years I had seen him at church.

Q. Well, did you see him a good many times there?

A. Well, a good many, yes.

Q. He was an active church worker, was he?

A. Yes, I would consider him so.

Q. Did you see him often at church in February, 1911?

A. Yes.

Q. What was the occasion of his being there frequently?

A. Well, meetings at that time.

Q. Revival meetings?

A. I don't know just what date—what time, do you?

Q. February, 1911.

A. February, 1911, yes.



Q. There was a revival there run by Mr. Ruth and Mr. Eliot—Reverend Ruth and Reverend Eliot.

A. No, not together, I don't think.

Q. That is the first one then the other one?

A. Yes, Ruth run his meeting first, I think.

Q. How long did those meetings run?

Mr. COCHRAN: I object as asking the same question indirectly.

COURT: I suppose he can answer.

A. Which meeting do you refer to?

Q. Those revival meetings in February, 1911.

A. The ones that Ruth run?

Q. Both of them?

A. I couldn't say now, how long they was there. I don't know.

Q. The revival was about a month.

A. Ruth was just there two weeks.

Q. Now, you saw Mr. Moats at these meetings, did you?

A. Yes, sir.

Q. Did you attend all of them?

A. No, not all.

Q. A good many?

A. Most of the meetings I was there, yes.

Q. Now, some of these were day meetings and some night meetings?

A. I did not attend any day meetings.

Q. There were some day meetings?

A. There were.

Q. Now, did you have any opportunity to observe Mr. Moats at these meetings?

A. I did.

Q. Did he participate?

A. Why he always, as long as—well, for several years he has helped in the church work there.

Q. I am speaking now about these particular meetings. Did he participate in these meetings?

A. Yes.

Q. And was he one of the speakers from time to time?

Mr. COCHRAN: Now, your Honor, we object to that.

COURT: I don't think your cross examination should go that far, because he was not asked anything about that on direct examination.

Q. Now, with reference to his character, did you ever have a talk with him about his Philippine experience?

A. No, not with him.

Q. Didn't he tell you something about having killed a Moro and it preyed on his mind?

Mr. COCHRAN: We object to that as not cross examination in any respect.

COURT: I don't think it is material, or proper cross examination, unless it goes to his general reputation as a law-abiding, truthful man.

Mr. PLATT: Goes to his character with reference to his mental attitude.

COURT: For that purpose I suppose it is competent.

Mr. COCHRAN: Save an exception.

COURT: The exception is allowed.

A. Do you want an answer to that question?

Q. (Read as follows). Didn't he tell you something about having killed a Moro, and it preyed on his mind?

A. Not he himself did not. The evidence came to me from other parties.

Q. Now, at this meeting did he make any exclamations in your——

Mr. COCHRAN: We object to that as not cross examination.

COURT: I don't think that is proper cross examination. You can only ask on cross examination about his general reputation for honesty and probity.

Mr. PLATT: Of course if counsel insists on narrowing the inquiry to that one question, I am helpless.

COURT: Yes, that is what he did. He only asked that on direct examination, and has a right, of course, to insist that the cross examination shall be confined to that subject.

#### Re-Direct Examination.

Q. Mr. Moats was a member of the 2nd Oregon, wasn't he, when it went over to the Philippines some years ago?

A. Well, I couldn't say. He had been at the Philippines, yes.

Q. Wasn't he a member of—was he in the army over there, a soldier?

A. Yes, he was a soldier.

Mr. PLATT: In the regular army, I understood

him to say.

Q. There is a question I want to ask, your Honor. You were subpoenaed here by the defense, were you not?

A. I was.

Witness excused.

PLAINTIFF RESTS.

DEFENSE RESTS.

This was all the evidence introduced upon the trial of this case and at its conclusion the defendant moved for a directed verdict in favor of the defendant and against the plaintiff in words and figures as follows:

Mr. MONTGOMERY: If the Court please, we desire at this time to move for a directed verdict against the plaintiffs, and in favor of the defendant, upon the ground, first, that no evidence has been adduced by the plaintiffs sufficient to support a verdict in favor of the plaintiffs. And upon the further ground that the uncontradicted evidence in the case establishes that the insured consulted physicians prior to March 16, 1911. And upon the further ground that it affirmatively appears from the evidence in this case that the beneficiary had knowledge of these consultations. And upon the further ground that the uncontradicted evidence in the case shows that the representations which were made were material to the risk, and that the application would not have been accepted by the defendant company had the truth regarding these representations been made known to the company.

And upon the further ground that the uncontradicted evidence in the case establishes that the beneficiaries accepted these policies after the insured had been committed to the sanitarium conducted for mental and nervous diseases, and that the uncontradicted evidence in the case establishes that on the date of his confinement to the sanitarium the insured was insane.

\* \* \* \* \*

### OPINION.

The above motion was argued by counsel for the defendant and counsel for the plaintiff respectively and after said argument the court denied said motion rendering thereon the following opinion in writing:

COURT: The Court and jury have a function to perform in cases of this character, and in all law cases, and the Court has no right to invade the province of the jury by directing a verdict unless the facts are uncontested—the material facts are uncontested. If there is any controversy, any dispute, or any different inferences that may be drawn from them, it is for the jury and not for the Court. Now, the defense here is that Mr. Moats, either untruthfully stated facts material to the risk, or he wilfully suppressed facts material to the risk, and if he did so, then that would void the policy, because this company, as all insurance companies, have a right to require applicants to answer the questions which they deem material to the risk, and it is necessary for an applicant to answer these questions truthfully, and not wilfully suppress any fact of which the company inquires. Now, in that view, the questions propounded to Mr. Moats, and



which it is charged he answered untruthfully are important and material questions, and if the answers are not substantially true, and were such as influenced this company in granting the policy, the untruthful answers would be sufficient to void the policy. But there is a dispute, I think, in the testimony, as to whether these answers are true or false. Mrs. Moats testified, as I remember her testimony, that her husband did not consult any of these physicians for nervousness or any other trouble prior to the date of this policy. She says that he did not consult Dr. Molitor in March, and that he did not call upon and consult the other doctors on the morning before this policy was issued, and that the consultation with Dr. Upton was after the date of the policy. And in addition to that, she testified that her husband was, as far as she could see, in good health, was not nervous, not suffering from sleeplessness, and, in other words, her testimony indicated, or tended to show, at least, that these answers were true. While she is contradicted by the doctors—she is contradicted by the proofs that were submitted, I do not know that it is conclusive upon her, and she had a right to explain it if she could, and in that view, it seems to me, that as far as the first question here is concerned, there is some evidence to go to the jury upon this disputed question as to whether those representations were true or false.

The effect of delivering the policies after Mr. Moats was taken to the sanitarium in Portland is a question upon which I am not prepared to announce any very

definite conclusion at this time. I do not know what the effect of that is, but shall leave that fact to be determined in case it becomes necessary to consider it. And the motion for the present will be overruled.

Mr. PLATT: Save an exception.

COURT: The exception is allowed.

COURT: The jury will understand, of course, that in overruling this motion, the Court has not indicated its views as to any disputed question of fact in this case. It is simply holding that in its judgment, there is some evidence to go to the jury.

To the above ruling the defendant saved an exception which exception was allowed. Thereupon counsel for the plaintiff argued to the jury and thereafter the court gave the following instructions.

### INSTRUCTIONS.

Gentlemen of the Jury: In March, 1911, the New York Life Insurance Company issued two policies on the life of one George Scott Moats, each of the policies being for \$5,000, one in favor of his wife, Ida M. Moats, and the other in favor of his child, George A. Moats. During the life of the policy the assured died. Proofs of death were submitted by Mrs. Moats in her own right, and as the guardian of her child. The company declined to pay the risk, and hence these actions. There are two of them, one brought by Mrs. Moats in her own right, and another brought by her as guardian of her child. The issuance of the policies the payment of the premiums, and the death of Mr. Moats within the life of the contracts are admitted or clearly shown by the testimony, and these facts make

out a *prima facie* cause in favor of the plaintiff, and impose the burden on the defendant to show, by preponderance of the testimony, some reason why these contracts should not be enforced. This it has attempted to do, alleging that the contracts of insurance were procured by fraud, and the specific acts of fraud set up in the answer are that Mr. Moats, in answer to certain questions propounded to him by the medical examiner of the defendant company, gave untrue answers thereto, and that such answers were in reference to and concerning matters material for the company to know in order that it might determine whether or not it would issue these policies. Now, these questions which the defendant alleges Mr. Moats answered untruly are, first, "Have you had or suffered from, any of the following diseases: 1. Of the brain or nervous system," and the answer is "No." "Of the heart or lungs?" and the answer is "No"; of the stomach, liver, kidneys or bladder," and the answer is "No"; of the skin, middle ear or eyes?" and the answer is "No"; have you ever suffered from any disease not mentioned above?" And the answer is "Nothing except Grippe and acute dysentaery"; Have you been under the care of, or consulted a physician concerning yourself for any cause within five years?" And the answer is, "Once three years ago." "If so, for what ailment; name and address of physician?" Answer, a pain in the back, N. Molitor, La Grande." And it is charged in the answer, and claimed by the company, that these statements were untrue—that some of these statements, as I shall call your attention to particularly,

were untrue, and known to be untrue to Mr. Moats, at the time he made this application. It is alleged that when he said he was not suffering from any disease of the brain or nervous system, that he told an untruth, and that he knew it was untrue. It is also said that when he answered the question, "Have you ever suffered from any disease not mentioned above," and he said "Nothing except La Grippe and acute dysentery," that he stated an untruth. Again, it is said, that when he answered the question, "Have you ever been under the care of, or consulted a physician concerning yourself for any cause within five years?" and he said, "Once three years ago," that that was an untruth. And again, it is said that when he answered the question, "If so, for what ailment," and he said it was a pain in the back, that that, in connection with the former question, was an untrue statement—the statement to the effect that he had not consulted a physician within three years, and that the ailment for which he did consult was a pain in the back. Now, the insurance company has the right to require applicants for insurance to answer questions affecting the risk, and it is the duty of such an applicant to answer such questions truthfully, and if they make false statements, knowing them to be false, and they are concerning such matters as are material to the risk, they avoid the policy. An insurance company, like every other organization, has a right to make contracts upon such terms and conditions as the company see proper, and it has a right, and the law gives it the right, to require the applicants to truthfully answer ques-



tions propounded by it in reference to insurance. And that is true in this case. And the question to be determined by you in this case is whether or not Mr. Moats, when he said he had never had or suffered from brain or nervous diseases, stated the truth, and, second, when he said he had not consulted a physician for three years, whether that was the truth or not. Now, the question as to whether these questions are material or not is to be determined by the question of whether or not they are such matters as would influence the company in their accepting or rejecting the risk, and the undisputed testimony in this case is that these two questions—the first, as to whether Mr. Moats had suffered from brain or nervous diseases was a material matter; and that, if he was suffering from nervous diseases, or if he had been suffering from sleeplessness or nervousness, and had so stated as he ought to have done, if it was true, the undisputed testimony is that the company would not have issued these policies. Again, the undisputed testimony is, that if he had stated in his answers that he had consulted a physician for nervousness and sleeplessness a short time before the issuance of these policies, that the company would not, with that knowledge, have issued the policies. And this evidence, undisputed as it is, shows that these questions are material, and affect the risk so that it becomes necessary for you to determine whether the questions were truthfully answered or not, and that is a question for you to consider from all the testimony in this case.

You will remember that Dr. Molitor testified that



some time in March, early in March, 1911, he had some conversation with Mr. Moats about his condition, and that he returned to the office about the 14th of the month, and that he had some further conversation with him about it. There is a question here whether Dr. Molitor was consulted professionally or not, but there is evidence that Mr. Moats was at the office at about that time. Then it is again claimed by the defendant company, that on the morning before this policy was taken out, Mr. Moats called upon Dr. Loughlin and consulted him about sleeplessness and nervousness, and said to Dr. Loughlin that he was suffering from sleeplessness and nervousness. Now, there is a controversy here as to whether that conference took place or not. You heard Dr. Loughlin's testimony, and heard what he said about it, and you heard what Mrs. Moats said about the matter, and it is for you to judge whether that occurred as Dr. Loughlin testified or not. If, as a matter of fact, Mr. Moats did call on Dr. Loughlin on the morning of the 16th of March and consulted, and said to Dr. Loughlin that he was suffering from sleeplessness and nervousness, and consulted the doctor previously about that matter, and then on the afternoon of that same day, when he applied for this insurance, and was asked by the medical examiner of the company, as to whether he was suffering from brain or nervous diseases, and neglected to advise the physician of the company that he had been suffering from such trouble, then it would be such a false representation or untrue statement as would void this policy. And,

again, if he consulted Dr. Loughlin on the morning of the 16th about his nervousness and sleepless condition, if he was in that condition, and on the afternoon, when he applied for this insurance, in answer to the questions propounded by the medical examiner, as to when he had last consulted a physician, and stated that it was three years ago, and neglected to advise the medical examiner, and through the examiner the company, that he had consulted Dr. Loughlin on the morning of the 16th, and a few hours prior to the making of this application, that would be a false statement, and one which, under the undisputed testimony, would void this policy. So that these are questions for you to determine from the testimony.

Now then, I do not understand that consulting a physician about some slight ailment or indisposition,—failure of an applicant for insurance to state that he had consulted a physician about some slight or immaterial ailment, would be necessarily a fraudulent statement within the meaning of this policy, but it must be something substantial—something of some import or serious character. It is the duty of an applicant to be honest, fair, conscientious, state the facts as he understands them, so that the company may determine for itself whether it will issue the policy or not. These are proper questions of fact for you to determine from the testimony in the case.

The plaintiff, as I have said, makes out a *prima facie* case when she produced the policy, showed that she had paid the premium, and showed that death of the assured within the life of the policy, and the

burden is on the defendant to overcome this prima facie case by showing that the policy was issued to the plaintiff's intestate through fraud and misrepresentation in the particulars to which I have called your attention. You are the exclusive judges of these questions. You are the exclusive judges of all questions of fact in this case. You have heard the testimony of the witnesses, and you are the exclusive judges of their credibility, and the weight to be given to their testimony. And after you have considered all the testimony in the case, then you will arrive at such a verdict upon the issues as I have stated them to you, as you think the evidence warrants.

Now, it is shown here in the testimony that when the company refused to pay these policies, that they returned, or offered to return, the premium, and the evidence was produced here on the trial that they had deposited that money with the clerk for the benefit of the plaintiff.

Are there any other matters you would like to instruct the jury in?

Mr. COCHRAN: I don't know of any others.

Mr. PLATT: Of course, your Honor, in mentioning Dr. Loughlin and Dr. Molitor, you didn't intend to take from the jury the testimony of Dr. Upton.

COURT: No. No, nor any other testimony. I alluded to those two, because they were in my mind. In alluding to any testimony, I do not want the jury to understand that I have alluded to all the testimony in the case. Nor do I want the jury to understand or infer for a moment that they are to consider or find

their verdict in accordance with any intimation that the court may have made throughout the trial upon the question of fact, unless it meets with your approval. Under the law you are to determine all questions of fact, and not the court, and you cannot shirk that duty any more than the court can shirk its duty. And if, during the trial, any intimation has fallen from the court as to its views on any question of fact in the case you are to disregard it unless it meets with your approval.

There are two cases, as I said, on trial, and it will therefore be necessary for you to find a verdict in each case. Forms have been prepared by counsel, and you may use these or similar forms. If you find in favor of the plaintiff, it will be necessary for you to insert the amount.

Mr. COCHRAN: If the Court deems it advisable, I would like an instruction on expert testimony.

COURT: Counsel has requested an instruction about expert testimony. There have been called and testified before you physicians who have testified as experts; that is, they have been permitted or allowed to give their opinion—professional opinions, based upon certain facts—hypothetical questions. Now, the testimony of these experts was intended for the purpose of aiding you in arriving at a conclusion in this case. You are to give to their testimony whatever weight you think it is entitled to. You are not obliged to follow the opinion of any expert unless it meets with your approval. They are advisory, and their testimony is to be weighed by the jury for



whatever you may think it is worth.

The amount of these policies, you will remember is \$5,000 each. So if you find in favor of the plaintiff it will be for \$5,000 in each instance. If you find for the defendant, it will simply be a statement to that effect.

Mr. PLATT: I wish to except to the refusal of the Court to give defendant's requested instructions one to nine inclusive.

COURT: The exception is allowed.

COURT: There is another matter to which I think I should call the jury's attention, in view of the fact that the state law and the Federal law differ. In the Federal Court the verdict must be unanimous, and in the state court it is three-quarters, so you will all have to agree with any verdict rendered, and when you do, you may have your foreman sign it.

In this relation, it is hereby certified that there were at this time in the hands of the court nine written requests for instructions which had been prepared and submitted to the court by the defendant, prior to the arguments of counsel to the jury, among which appeared the following:

"I instruct you as a matter of law that if a man makes a representation as of his own knowledge, not knowing whether it be true or false and it is in fact untrue, he is guilty of fraud, as much as if he knew it to be untrue; and if you find from the evidence of this case that the insured George Scott Moats did on the 16th day of March, 1911, represent to the defendant in this case that he had never had any disease of the



brain or nervous system or that he had not consulted a physician within three years from the date of said representation except once for a pain in the back, or that no other company had ever declined to issue a policy upon his life, or either of them, and you further find that the deceased prior to said date had suffered from any disease of the nervous system or brain and further find that he had consulted physicians more than once within three years from the date of said representation, and had been rejected as an applicant for insurance in any other Insurance Company and you further find that said representations were material to the risk, and further find that said representations were in fact untrue, then your verdict must be for the defendant.

I instruct you as a matter of law that it fully appears from the evidence of this case that the defendant did on the 23rd day of August, 1911, tender to the plaintiff herein the full amount of premium it had received from George Scott Moats, deceased, under the purported contract of insurance now being sued upon in this case, together with interest thereon from the 16th day of March, 1911, and I further instruct you that it fully appears from the evidence in this case that such tender was made within a reasonable time after the discovery of the alleged fraud claimed by the defendant, and that such tender made by the defendant company to the plaintiff herein constituted in law a complete recession of said contract of insurance, and if you find from the evidence in this case that said contract was procured by fraud then your

verdict must be for the defendant.

To the refusal of the court to give said instructions the defendant then and there excepted, which exception was allowed.

The jury thereupon retired to consider their verdict, and having returned into court with a verdict for the plaintiff the defendant thereupon moved the court for ten days in which to further move or plead, which motion was granted and afterwards and on the 31st day of May, 1912, moved the court to reconsider its ruling which it had reserved at the time of trial and to set aside the verdict, direct the verdict in favor of the defendant and enter a judgment notwithstanding verdict, of which motion the following is in words, letters, and figures a copy, to-wit:—

*“In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

### MOTION.

Now comes the defendant in the above entitled cause, appearing by Platt & Platt and Hugh Montgomery, its attorneys of record, and moves the Court for a judgment against the plaintiff above named, and in favor of the defendant above named, non obstante

verdicto, upon the grounds and for the reasons:

That it appears from the uncontradicted evidence introduced upon trial of the above entitled cause that the alleged policy of insurance, introduced by the plaintiff upon the trial of the above entitled cause, was not delivered to the insured, his beneficiary, or agent, until the 8th day of April, 1911; and

That it further appears from the uncontradicted evidence introduced upon the trial of the above entitled cause that the insured was, on the 21st day of March, 1911, confined to a sanatorium, and was, at the time of said confinement, insane; and

That it further appears from the uncontradicted evidence introduced upon the trial of the above entitled cause that the policy of insurance contracted for was not to take effect until the date of delivery.

PLATT & PLATT and HUGH MONTGOMERY,  
Attorneys for Defendant."

Which said motion for a directed verdict and a judgment notwithstanding verdict was, after argument by counsel for and against the motion, respectively, and after due consideration by the court, on the 8th day of July, 1912, overruled, to which ruling the defendant then and there excepted, which exception was allowed.

And thereafter, and on or about the 9th day of July, 1912, the defendant petitioned the court for a new trial, of which petition the following is in words, letters, and figures a copy, to-wit:

*"In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,  
Defendant.

PETITION.

NOW COMES the defendant in the above entitled cause appearing by Platt & Platt and Hugh Montgomery, its attorneys of record and petitions the court for a new trial in the above entitled cause upon the ground and for the reasons;

I.

That it appears from the uncontradicted evidence introduced without objection upon the trial of the above entitled cause that the alleged policy of life insurance introduced in evidence by the plaintiff upon the trial of the above entitled cause was not delivered to the insured, his beneficiary, or agent, or other person or persons acting for him until the 6th day of April, 1911, and that prior to the 6th day of April, 1911, and before the delivery of said alleged policy of life insurance which was the basis of the above entitled action, and on or about the 21st day of March, 1911, the insured was confined to a sanitarium conducted for mental and nervous diseases and was at the time of said confinement, insane.

## II.

That it further appears from the evidence of the plaintiff introduced upon the trial of the above entitled cause that said alleged policy of life insurance was not signed until the 25th day of March, 1911, and that prior to the signing of said alleged policy of life insurance as shown by the evidence introduced on behalf of the defendant in the above entitled cause, which evidence was not contradicted, and on or about the 21st day of March, 1911, the insured was confined to a sanitarium conducted for nervous and mental diseases and was at the time of such confinement, insane.

## III.

That it further appears from the uncontradicted evidence introduced by defendant upon the trial of the above entitled cause that the alleged policy of life insurance contracted for was not to take effect until the date of delivery, and it appears from the face of said alleged policy of life insurance introduced by the plaintiff upon the trial of the above entitled cause that the same was not to take effect until after delivery, and that it appears from the uncontradicted evidence of the case that before the delivery of said alleged policy of life insurance and before the signing of said alleged policy of life insurance and on or about the 21st day of March, 1911, the insured was confined to a sanitarium for mental and nervous diseases and was, at the time of such confinement, insane.

## IV.

That the verdict rendered against the defendant in



the above entitled cause was contrary to and against the weight of evidence introduced upon the trial of the above entitled cause.

WHEREFORE defendant petitions and respectfully prays that the verdict rendered in the above entitled cause and the judgment entered thereon be set aside and a new trial granted.

PLATT & PLATT and HUGH MONTGOMERY,  
Attorneys for Defendant."

Which said petition for a new trial was, after argument by the respective counsel for the plaintiff and defendant, and after due consideration by the court, denied by said court on the 5th day of August, 1912, to which ruling the defendant then and there excepted, which exception was allowed.

And now, because the foregoing matters and things are not of record in this cause, I, Robert S. Bean, District Judge and the Judge trying the above entitled action in the District Court of the United States for the District of Oregon, hereby certify that the foregoing Bill of Exceptions truly states the proceedings had before me on the trial of the above entitled action and contains all the evidence, both oral and written, introduced by either of the said parties through said trial, and all the instructions of the court on the questions of law presented, and that the exceptions taken by the defendant therein were duly taken and duly allowed, and that said Bill of Exceptions was duly prepared and submitted within the time allowed by the rules of court, as extended by stipulation of the parties, and the order of this court duly

made and entered in accordance with the provisions of such stipulation, extending defendant's time in which to prepare and serve its Bill of Exceptions up to and including the 4th day of September, 1912, and a further stipulation of the parties, and the order of this court duly made and entered in accordance with the provisions of said stipulation, extending defendant's time in which to prepare and serve its Bill of Exceptions up to and including the 14th day of September, 1912, and is now signed, sealed, and settled as and for the Bill of Exceptions in the above entitled action, and the same is ordered to be made a part of the record in said action.

R. S. BEAN,  
Judge.

Dated this 9 day of September, 1912.

[Endorsed]: Bill of Exceptions. Filed Sep. 9, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 30 days of September, 1912, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

**[Petition for Writ of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendants.

TO THE HONORABLE JUDGES OF THE DIS-  
TRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF OREGON:

New York Life Insurance Company, a corporation, defendant in the above entitled cause, conceiving itself aggrieved by the final order and judgment of this court made and entered against it and in favor of the plaintiff on the 29th day of May, 1912, and rulings and instructions in said cause made, as set forth in its Assignment of Errors herein filed, petitions said court for an order allowing said defendant to prosecute a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon giving such security, all further proceedings in this court be suspended and staid until the determination of said Writ of Error by the said United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises, defendant alleges manifest error has happened, to the great damage of the New York Life Insurance Company, a corporation, defendant herein;

That defendant has filed herewith its Assignment of Errors upon which it relies and will urge in the said Appellate Court:

WHEREFORE, defendant prays that a Writ of Error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit to this court, for the correction of the errors so complained of, and that a transcript of the records, proceedings, papers and all things concerning the same, upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said Judgment be reversed, and that defendant recover judgment as demanded in its answer.

PLATT & PLATT and HUGH MONTGOMERY,  
Attorneys for Defendant.

[Endorsed]: Petition for Writ of Error. Filed Sep. 30, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of September, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

**[Assignments of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

COMES NOW the defendant above named, appearing by Messrs. Platt & Platt and Hugh Montgomery, its attorneys of record, and says that the judgment and final order of this Court, made and entered in the above entitled cause on the 29th day of May, 1912, in favor of the plaintiff above named and against said defendant, is erroneous and against the just rights of said defendant, and files herein, together with its petition for a writ of error from said judgment and order, the following assignment of errors, which it avers occurred upon the trial of said cause:

I.

The above entitled court erred in overruling and not sustaining the defendant's motion for a directed verdict in favor of the defendant, which motion was made at the close of the introduction of all the evidence and the taking of all testimony in the above entitled cause, and which mention was based upon the grounds that it appeared from the uncontradicted evidence introduced upon the trial of said cause, that one George S. Moats, did on the 16th day of March, 1911, make application to the New York Life Insurance Company, defendant above named, for a policy of life insurance, and was at the time of making such application asked the question whether or not he had consulted a physician within three years, to which question he an-



swered that he had consulted a physician on one occasion three years before for a pain in the back, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that said applicant had within three years prior to the 16th day of March, 1911, consulted several physicians with reference to nervousness and sleeplessness, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause and from the proofs of death furnished by the plaintiff in said cause, that the applicant had consulted a doctor with reference to nervousness and sleeplessness on the 16th day of March, 1911, just prior to the time of making said application for life insurance, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause, that at the time of making his application for life insurance in defendant company, the said applicant was also asked if he had ever suffered from any disease of the nervous system or brain or any other disease not mentioned, to which the applicant answered no, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that all and each of the said representations were material to the risk.

## II.

The above entitled court erred in overruling and not sustaining the defendant's motion for a directed verdict in favor of the defendant, which motion was made at the close of the introduction of all the evidence and the taking of all the testimony in the above entitled cause, which motion was based upon the

grounds that it appeared from the uncontradicted evidence introduced upon the trial of said cause, that one George S. Moats did on the 16th day of March, 1911, make application for life insurance in the New York Life Insurance Company, defendant above named, and did at the time of making such application represent to the said defendant company that he never had suffered from any disease of the nervous system or brain, or other disease not mentioned, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that the said applicant was on the 21st day of March, 1911, confined to a sanitarium conducted for nervous and mental diseases, and was at the time of said confinement, suffering from neurasthenia and was at the time of said confinement insane, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that the alleged policy of life insurance was not delivered to the said applicant, his beneficiary and those acting for him, until the 6th day of April, 1911, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause, that the alleged policy of life insurance was not to take effect until delivery, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that the defendant Insurance Company, had no knowledge of any change in the physical or mental condition or health of the said applicant, prior to the date on which proofs of death of the applicant were furnished the defendant company by the plain-

tiff in said cause, to-wit: On the 1st day of August, 1911, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that all and each of the said representations were material to the risk.

### III.

The above entitled court erred in overruling and not sustaining the defendant's motion for a judgment notwithstanding verdict and for a directed verdict upon a ruling reserved at the trial of the above entitled cause, which motion was based upon the grounds that it appeared from the uncontradicted evidence introduced upon the trial of said cause, that the alleged policy of life insurance sued upon in said cause was not to take effect until delivery, and that the application for said alleged policy of life insurance was made on the 16th day of March, 1911, and said alleged policy was not delivered to the applicant his beneficiary and those acting for him, until the 6th day of April, 1911, and that at the time of said application the applicant represented to defendant company that he had never suffered from any disease of the nervous system or brain and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that on the 21st day of March, 1911, the applicant was confined to a sanitarium conducted for nervous and mental diseases and was at the time of said confinement suffering from neurasthenia and was insane, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause, that the defendant company had no knowledge

of any change in the mental or physical condition of the applicant prior to the date when proofs of death of the applicant were submitted to the defendant company by the plaintiff in said cause, to-wit: On the 1st day of August, 1911, and that it also appeared from the uncontradicted evidence introduced upon the trial of said cause that all and each of the said representations were material to the risk.

#### IV.

That the above entitled court erred in overruling and not sustaining defendant's motion to set aside the judgment entered in the above entitled cause against said defendant and in favor of the plaintiff, which motion was based upon the grounds that the judgment was contrary to the weight of evidence introduced upon the trial of said cause.

WHEREFORE, the said defendant and plaintiff in error prays that the judgment of said court be reversed and such directions be given that full force and efficacy may enure to the defendant by reason of the defense set up in its answer filed in said cause, and that a judgment be entered in favor of the defendant in accordance with the demand of its answer filed in said cause.

PLATT & PLATT and HUGH MONTGOMERY,  
Attorneys for Defendant.

[Endorsed]: Assignment of Errors. Filed Sep. 30, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 30 day of September, 1912, the same being the 78 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Order Allowing Writ of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation  
Defendant.

This 30th day of September, 1912, came the defendant above named, New York Life Insurance Company, appearing by Platt & Platt, and Hugh Montgomery, its attorneys of record, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error from the decision and judgment of this court made and entered herein on the 29th day of May, 1912, in favor of the plaintiff above named and against said defendant, and the rulings and instructions made upon the trial of the above entitled cause, out of the United States Circuit Court of Appeals in and for the Ninth Circuit, to this Court, together with an assignment of errors intended to be urged by it, within due time, and also praying that a



transcript of the record and proceedings and papers upon which the said judgment herein was rendered, duly authenticated, may be sent to the said Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and staid until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises,

NOW, THEREFORE, on consideration thereof this Court does allow said writ of error upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Seventy-five Hundred 00|100 Dollars (\$7,500.00), to the effect that if the said defendant, New York Life Insurance Company, shall prosecute the said writ of error to effect, and answer all damages and costs, if defendant fails to make its plea good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the court, and it is ordered that all further proceedings in this court be and the same are hereby suspended and staid until the determination of said writ of error by the United States Circuit Court of Appeals and that said bond shall operate as a superseas bond.

Dated this 30th day of September, 1912.

R. S. BEAN,  
Judge.

And afterwards, to wit, on the 30 day of September, 1912, there was duly filed in said Court, a Bond, in words and figures as follows, to wit:

**[Bond on Writ of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA A. MOATS, Guardian of the person and estate  
of GEORGE A. MOATS, a minor,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, the New York Life Insurance Company, a corporation, principal, and Fidelity & Deposit Company of Maryland, a corporation, surety, are held and firmly bound unto Ida M. Moats, the above named plaintiff, in the sum of seven thousand five hundred Dollars (\$7,500.00), to be paid to the said Ida M. Moats, Guardian of the person and estate of George A. Moats, Guardian, her executors or assigns, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our successors or assigns, firmly by these presents;

Sealed with our seals and dated the 30th day of September, 1912.

WHEREAS, the above named New York Life Insurance Company, a corporation, is prosecuting a

Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Judgment in the above entitled cause by the District Court of the United States for the District of Oregon, entered on the 29th day of May, 1912.

NOW, the consideration of this obligation is such that if the above named New York Life Insurance Company shall prosecute said Writ of Error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

NEW YORK LIFE INSURANCE COMPANY,

By Milton Maxon,

Attorney in Fact.

FIDELITY & DEPOSIT COMPANY OF MARY-  
LAND,

By W. Miller,

Agent.

By Robert T. Platt,

Attorney-in-Fact.

Examined and approved this 30th day of September, 1912.

R. S. BEAN,

District Judge.

[Endorsed]: Bond on Writ of Error. Filed Sep. 30, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of September, 1912, there was duly filed in said Court, a Writ

of Error, in words and figures as follows, to wit:

[Writ of Error.]

*In the United States Circuit Court of Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA,

Ninth Judicial Circuit—ss.

The President of the United States,  
TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between Ida M. Moats, Guardian of the Person and Estate of George A. Moats, a Minor plaintiff, and defendant in error, and New York Life Insurance Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said New York Life Insurance Company, a corporation, defendant and plaintiff in error, as by its answer appears, we being willing that error, if any there has been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit

Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said Court, on the 30th day of October, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the United States, this ..... day of September, A. D., 1912, and in the one hundred thirty-sixth year of the Independence of the United States of America.

Allowed by: R. S. BEAN,  
United States District Judge.

Attest:

A. M. CANNON,

Clerk of the District Court of the United States for  
the District of Oregon.

By F. H. Drake,

Deputy.

[Seal.]

[Endorsed]: Writ of Error. Filed Sep. 30, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 5 day of October, 1912, there was duly filed in said Court, a Citation on Writ of Error, in words and figures as follows, to wit:



## [Citation on Writ of Error.]

UNITED STATES OF AMERICA,

District of Oregon—ss.

To Ida M. Moats, Guardian of the person and estate  
of George A. Moats, a minor,

## GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein New York Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District.  
this 30th day of September, in the year of our Lord,  
one thousand, nine hundred and twelve.

R. S. BEAN,  
Judge.

Due and legal service of the within Citation on Writ of Error by a certified copy thereof prepared and certified to as such by Hugh Montgomery, as attorney for plaintiff in error, is hereby admitted at Portland, Oregon, this 5th day of October, 1912.

C. E. COCHRAN,  
of Attorneys for Defendant in Error.

[Endorsed]: Citation on Writ of Error. Filed Oct. 5, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on Tuesday, the 29 day of October, 1912, the same being the.....Judicial day of the Regular July, 1912, Term of said Court Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Order Enlarging Time to File Transcript.]**

*In the District Court of the United States for the  
District of Oregon.*

IDA M. MOATS, Guardian of the person and estate  
of GEORGE ALBERT MOATS, a minor,  
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
corporation,

Defendant.

Now at this day, for good cause shown, it is ORDERED that defendant's time for filing and docketing the record on Writ of Error in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended sixty (60) days from this date.

R. S. BEAN,  
Judge.

Dated October 29, 1912.



# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

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NEW YORK LIFE INSURANCE COMPANY,  
a corporation,  
Plaintiff in error,  
vs.

IDA M. MOATS, guardian of the person and estate  
of GEORGE A. MOATS, a minor,  
Defendant in error.

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## BRIEF OF PLAINTIFF IN ERROR.

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Upon Writ of Error from the United States  
District Court for the District of Oregon.

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### STATEMENT OF THE CASE.

On the 16th day of March, 1911, a man by the name of George Scott Moats made application to the agent of the New York Life Insurance Company at La Grande, Oregon, for two policies of life insurance in the sum of five thousand dollars (\$5000) each. At the time of making this application the usual questions concerning his general life history were propounded to him and he submitted to the regular medical examination. He was asked among

other things whether he had consulted a physician within five years from the date of his application, to which he answered that he had consulted a physician three years prior thereto for a pain in the back, designating the physician consulted as N. Molitor, of La Grande, Oregon. He was also asked if he had ever suffered from any disease of the nervous system or brain, to which he answered no. Several different forms of disease were enumerated to him and he was asked if he had ever suffered from any, to which he replied that of all those mentioned acute dysentery was the only disease he had ever had, and that had attacked him several years prior thereto. He was further asked if he had ever suffered from any disease not mentioned, to which he answered no.

On the 17th day of July, 1911, less than five months after the date of this application, proofs of the death of the said George Scott Moats were submitted to the said New York Life Insurance Company, from which proofs of death it appeared that the said applicant had died at the Oregon State Insane Asylum on the 14th day of June, 1911, of delirium collapse following acute maniacal excitement. It will be observed from these dates that the death of the applicant occurred within about three months from the date of his application.

The peculiar circumstances presented by these proofs of death caused the Insurance Company to ask for additional information, and in accordance with its request there was furnished a further statement from a doctor by the name of Loughlin, whose name had been mentioned by the wife of the deceased in her statement submitted with proofs of



death as being one of the physicians who had attended the deceased during his lifetime. The statement furnished by Dr. Loughlin, which became part of the proofs of death, showed that the deceased had consulted him on the 16th day of March, 1911, with reference to nervousness and sleeplessness. It will be observed that the date of this consultation is the same date on which the application for insurance was made, and a further investigation disclosed that the consultation referred to had been made just prior to the application for insurance.

Immediately upon a disclosure of these facts, which disclosure took place about the 1st day of August, 1911, the New York Life Insurance Company sent one of its agents to the State of Oregon for the purpose of making a more detailed investigation of the very peculiar and suspicious circumstances shown upon the face of the proofs of death submitted. This investigation resulted in the exposure of a long continued series of fraudulently concealed events commencing about three months prior to the date of the application for life insurance, and continuing from the date of the application up until the date of the death of the said George Scott Moats.

On account of these concealments the New York Life Insurance Company refused to make any payments upon the policies in question, and tendered back the premiums which had been paid thereon. An action was instituted in the Circuit Court of the State of Oregon for Union County on each of these policies, and the cases were subsequently removed to the Federal Court for the District of Oregon

upon petition of the New York Life Insurance Company. On the 27th day of May, 1912, both cases came on for trial in the District Court of the United States for the District of Oregon at Pendleton, Oregon. The cases were consolidated for the purpose of trial and tried before a single jury. The jury brought in a verdict in favor of the plaintiff in each case, and for a review of the judgments entered thereon the defendant petitioned for a writ of error, which brings the present case now before this court.

At the close of all the evidence introduced upon the trial of these cases the defendant moved for a directed verdict upon the grounds that no evidence had been introduced by the plaintiffs sufficient to support a verdict in their favor, for the reason that the uncontradicted evidence showed that the deceased had several times consulted physicians with reference to his health immediately prior to the date of his application for insurance, which consultations he deliberately and fraudulently concealed from the Insurance Company, and which representations were, according to the uncontradicted evidence, material to the risk, and upon the further ground that it appeared from the uncontradicted evidence in the cases, that pending negotiations for the alleged contract of insurance and before its completion by delivery to the insured, he had become insane and his health irreparably impaired, all of which facts both he and those acting for him had concealed from the company. The trial court overruled the motion in so far as the first ground was concerned, but reserved his ruling as to the second proposition presented.

After the return of the verdicts and within the time allowed by the court the defendant moved for a judgment, notwithstanding the verdict, and asked the court at this time to reconsider the ruling which he had reserved and enter judgment in favor of the defendant, which motion was overruled and the application denied.

## SPECIFICATION OF ERRORS.

### I.

The trial court erred in overruling the motion for a directed verdict which was made by the plaintiff in error at the close of all the evidence introduced upon the trial of this case, and which motion was based upon the grounds that it appeared from the uncontradicted evidence introduced upon the trial of the case, and more particularly from the proofs of death submitted by the plaintiff in the case that the deceased had fraudulently stated to the Insurance Company at the time of his application that he had not consulted a physician within five years for any serious disorder, and had never suffered from any disease of the nervous system or brain or any other disease not mentioned in his medical examination, while in truth and in fact all of these representations were false and were, according to the undisputed testimony of the case, material to the risk.

### II.

The trial court erred in overruling the motion for a directed verdict which was made by the plaintiff in error at the close of all the evidence introduced

upon the trial of this case upon the ground that, pending negotiations for the alleged contract of insurance sued upon in this case, the applicant for insurance had become insane and his physical health irreparably impaired, all of which facts had been concealed from the Insurance Company, and of which facts they acquired no knowledge until the 1st day of August, 1911, almost two months after the death of the applicant for insurance.

### III.

The trial court erred in overruling the motion for a judgment notwithstanding the verdict made by the plaintiff in error for the entry of a verdict in this case in its favor, which motion was based upon the grounds that it appeared from the uncontradicted evidence introduced upon the trial of this case that the alleged contract for insurance was not to take effect until delivery, and that it appeared from the uncontradicted evidence in the case that the applicant for insurance had, pending negotiations for the contract of insurance and long before its completion, become insane and his physical health irreparably impaired, and that the Insurance Company had acquired no knowledge of these facts until almost two months after the death of the applicant.

### IV.

The trial court erred in overruling plaintiff's motion to set aside the judgment entered in this case and to grant the plaintiff in error a new trial upon the ground that the judgment was contrary



to the weight of evidence introduced upon the trial of this case.

## V.

The trial court erred in refusing to give the following written instruction submitted on behalf of the plaintiff in error:

"I instruct you as a matter of law that if a man makes a representation as of his own knowledge, not knowing whether it be true or false and it is in fact untrue, he is guilty of fraud, as much as if he knew it to be untrue; and if you find from the evidence of this case that the insured George Scott Moats did on the 16th day of March, 1911, represent to the defendant in this case that he had never had any disease of the brain or nervous system or that he had not consulted a physician within three years from the date of said representation except once for a pain in the back, or that no other company had ever declined to issue a policy upon his life, or either of them, and you further find that the deceased prior to said date had suffered from any disease of the nervous system or brain, and further find that he had consulted physicians more than once within three years from the date of said representation, and had been rejected as an applicant for insurance in any other Insurance Company, and you further find that said representations were material to the risk, and further find that said representations were in fact untrue, then your verdict must be for the defendant."

Transcript of Record, pages 433, 434.

To the refusal of the court to give this instruction the plaintiff in error then and there excepted, which exception was allowed.



## POINTS AND AUTHORITIES.

### I.

The application for life insurance is not a contract, and the applicant may withdraw his application and refuse to take insurance even though he has paid the premium.

Travis v. Nederland Life Insurance Co., 104 Fed. 486, 488 (1900).

McMaster v. New York Life Insurance Co., 99 Fed. 856 (1899).

### II.

If, pending negotiations for a contract of insurance, the health of the applicant is materially impaired, the failure of such applicant or those acting for him to inform the insurance company of this changed condition is a fraud which will avoid the contract.

Cable v. United States Life Insurance Co., 111 Fed. 19 (1901).

Equitable Life Assurance Society v. McElroy et al., 83 Fed. 631 (1897).

### III.

Witnesses who testify to an affirmative fact are to be believed as against those testifying to a negative.

Stitt v. Huidekoper, 17 Wall. 384, 394; 21 L. Ed. 644, 647.

Rhodes v. U. S., 79 Fed. 740, 743.

#### IV.

If a man makes a representation as of his own knowledge not knowing whether it be true or false, and it is in fact untrue, he is guilty of fraud as much as if he knew it to be untrue.

Bonelli v. Burton, 123 Pac. 37, 39 (Oregon, April, 1912).

#### V.

It is against public policy to provide that a contract of life insurance shall be incontestible from date.

Reagan v. Union Mut. Life Ins. Co., 189 Mass., 555; 76 N. E., 217.

#### VI.

A contract of insurance against acts of suicide is against public policy and void.

Ritter v. Mut. Life Ins. Co., 169 U. S., 139, ~~140~~  
42 L. Ed., 693, 700.

#### VII.

Whenever illegality appears from the evidence of a case, regardless of its source, the court must, on its own motion, dismiss the case.

Hall v. Coppell, 74 U. S., 542. 558; 19 L. Ed., 244, 248.

## ARGUMENT.

Owing to the relative importance of the errors assigned as a basis for reversal of the judgment in the present case we will proceed to discuss them in their inverse order.

This first presents for discussion the question of whether or not, pending negotiations for a contract of insurance, there is an obligation resting upon the applicant to disclose any material change in his physical condition, and in so far as this particular question is involved in the present case the facts as presented by the record are entirely undisputed.

These undisputed facts we will state in their chronological order.

On the 16th day of March, 1911, the application for the alleged contracts of insurance sued upon in this case was made. On the 21st day of March, 1911, the applicant was confined to the Mountain View Sanitarium at Portland, Oregon, an institution conducted for nervous and mental diseases, and was on this date insane. (Testimony of Dr. W. T. Williamson, Transcript of Record, pages 286, 287, 288. See also testimony of George Baldwin, Transcript of Record, pages 236, 237, 238.) The Insurance Company had absolutely no knowledge of these facts until the 1st day of August, 1911, when the proofs of death were submitted. This is shown by the undisputed testimony of Mr. McCall, page 135, Transcript of Record, and the undisputed testimony of Mr. Haskell, pages 201, 202, 203, 204, 205, Transcript of Record. It will be noted that this was five days after the application for insurance

was made at La Grande, Oregon. The court will, of course, take judicial notice of the fact that a period of approximately five days was consumed in transmitting this application from the place of its making at La Grande, Oregon, to the home office of the company in New York City. In fact it affirmatively appears from the undisputed evidence introduced upon the trial of this cause that the application of Mr. Moats for insurance was not received by the New York Life Insurance Company until the 23d day of March, 1911. (Transcript of Record, page 118, also page 124, also page 160.) Therefore it follows that this change in the health of the insured, as shown by the undisputed testimony, had taken place even before the company had had an opportunity to pass upon his application for insurance, and even before the Insurance Company had received the application of Mr. Moats. In other words, while the application of Mr. Moats was under investigation at the home office, as shown by the undisputed testimony of Messrs. McCall and Haskell, pages 112 to 205, inclusive, of the Transcript of Record, and by the testimony of Messrs. Harrison and Stoddart, pages 326 to 371, inclusive, of the Transcript of Record, the applicant for insurance was confined to a sanitarium and was in such a condition of health, both mentally and physically, that no insurance company, no matter how great its anxiety for business, and no insurance agent, no matter how great his anxiety for business, would have dared to issue a policy on the man's life. We call particular attention to this fact for the reason that we believe no case on record since the crea-

tion of the universe has presented such an open, notorious and flagrant piece of deception as is disclosed by this naked admission appearing upon the face of this record.

It is further undisputed, as shown by the testimony of Dr. Williamson and Mr. Baldwin, above referred to, that the applicant stayed at this sanitarium for a period of six days the first time, and was again returned to the sanitarium on the 11th day of April, 1911. It is further shown upon the face of the alleged policy of insurance set forth in the complaint filed in this case and introduced in evidence by the defendant in error that the alleged contract was not even signed until the 25th day of March, 1911. (Transcript of Record, page 4, also page 59.)

It is also an undisputed fact, shown upon the face of the record, that the alleged policy of insurance was not delivered to the insured or those acting for him until the 6th day of April, 1911, at which time the agent of the New York Life Insurance Company at La Grande, Oregon, called up the home of Mr. Moats and was instructed that he should mail the policies to the insured. (Testimony of H. P. Lewis, Transcript of Record, pages 281, 282.) The undisputed record also shows that it was agreed between the applicant and the Insurance Company at the time of his application as follows:

"I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime. \* \* \* That any payment on account of the first premium before delivery of the policy to me shall be binding upon the company only in accord-



ance with the company's receipt therefor on coupon receipt form duly filled out and detached from this application."

Transcript of Record, page 145.

"Dated at La Grande, Ore., March 16th, 1911.

I hereby declare that I have paid to H. P. Lewis two hundred sixty-eight 30-100 dollars in cash, and that I hold his receipt for the same, made up, without alteration, on the receipt form detached from and corresponding in date and number with this application. I assent to the terms of said receipt.

(Signature of applicant) George Scott Moats."

Transcript of Record, page 146.

The receipt above referred to provides amongst other things as follows:

"Second. That if the company fails to offer to deliver a policy on said application within sixty days from this date, and if such failure is not attributable to the applicant's neglect or refusal to comply with the company's rules, regulations and requirements, \* \* \* the company will return said sum to the applicant upon surrender of this receipt.

Third. That if said company within sixty days from this date offers to deliver to said applicant a policy of insurance on the plan applied for, and said offer is refused, then said company shall retain said sum in consideration of the trouble and expense it shall have incurred on account of said application."

Transcript of Record, pages 163, 164.

Furthermore, the following language appeared on the face of the policy itself:

"After delivery of this policy to the insured, it takes effect, etc."

Transcript of Record, page 4.

The facts as disclosed by the above provisions appear upon the face of the record as undisputed

facts in this case. It therefore conclusively appears that the applicant for insurance and the Insurance Company had expressly agreed with each other that no contract of insurance should be in effect between them until the delivery of the policy. As is shown by these uncontradicted provisions the company could have at any time refused to deliver a policy by simply returning the premium, and the applicant could have refused to accept a policy. These facts were in no way affected by the further fact that the applicant had paid his premium, because the premium as paid was accepted only in accordance with the company's receipt, from which receipt it appears, as shown above, that the premium was to be returned in case no policy was delivered, and was to be retained by the company only in the event that the applicant should for any reason wrongfully refuse to accept a policy, and then only for the purpose of covering the items of expense which had been paid out by the company.

No question can arise as to the validity of these provisions, for the federal courts have held that even in the absence of such provisions the payment of a premium does not of itself bind the company. This question was directly passed upon by the Circuit Court of Appeals for the Eighth Circuit in a decision rendered by Judge Sanborn. The following excerpt very concisely presents the opinion of the court in this particular:

"An application for life insurance is not a contract. It is only a proposal to contract on certain terms which the company to which it is presented is at perfect liberty to accept or to reject. It does not in any way bind the company to accept the risk proposed, to make

the contract requested, or to issue a policy. Nor does it in any way bind the applicant to take the policy, to make the contract he proposed, or to pay the premium until his proposal has been accepted by the company and its policy has been issued. Until the meeting of the minds of the parties upon the terms of the same agreement is effected by an acceptance of the proposition contained in the application or of some other proposition, each party is entirely free from contractual obligations. The applicant may withdraw his application and refuse to take insurance on any terms. He may modify his proposal, may affix additional conditions or terms to it, or may make an entirely new proposition, while the company may refuse to entertain any proposition, or may reject that presented and submit a substitute. Nor is the freedom of the parties to retire from the negotiations or to modify their proposals, at any time before some proposition has been agreed upon by both, ever lost or affected by the fact that the applicant accompanies his proposal or application with a promise to pay the premium in the form of promissory notes, or even by an actual payment thereof. Until his application is accepted such a promise or payment is conditional upon the acceptance, and his application is still no more than a proposition to take and to pay for the insurance if the company accepts his terms. The payment of the premium when the application is signed does not bind the company to accept his terms, nor does it estop the applicant from recovering the money he pays if the company rejects his proposal. These are fundamental rules of the law of contracts which are constantly applied in this and other courts, and which are decisive of the case before us. *Paine v. Insurance Co.*, 51 Fed. 689, 691, 2 C. C. A. 459, 461, 10 U. S. App. 256, 263, 264; *Society v. McElroy*, 83 Fed. 631, 640, 28 C. C. A. 365, 374, 49 U. S. App. 548, 564; *McMaster v. Insurance Co.*, 40 C. C. A. 119, 99 Fed. 856, 866; *Giddings v. Insurance Co.*, 102 U. S. 108, 112, 26 L. Ed. 92; *Griffith v. Insurance Co.*, (Cal.) 36 Pac. 113, 115; *Insurance Co. v. Young's Adm'r*, 23 Wall. 85, 107, 23 L. Ed. 152; *Insurance Co. v. Ewing*, 92 U. S. 377, 381, 23 L. Ed. 610;

Harnickell v. Insurance Co., 111 N. Y. 390, 399, 18 N. E. 632; Whiting v. Insurance Co., 128 Mass. 240; Markey v. Insurance Co., 118 Mass. 178, Id. 126 Mass. 158; Rogers v. Insurance Co., 41 Conn. 97, 106; Insurance Co. v. Collierd, 38 N. J. Law 480, 483; Heiman v. Insurance Co., 17 Minn. 153, 157 (Gil. 127); Hogben v. Insurance Co., (Conn.) 38 Atl. 214-216."

Travis v. Nederland Life Ins. Co., 104 Fed. 486, 488 (C. C. A., Eighth Circuit, 1900).

Even if Mr. Moats had not agreed with the company as above shown by the provisions of the receipt which he accepted from the company, as well as his own agreement that no contract should be considered in force between himself and the company prior to the time of delivery, still under the case just cited there would have been no completed contract until the time of delivery.

As above stated, however, the undisputed testimony of the case shows that before the application of Mr. Moats was actually presented to the New York Life Insurance Company, in order that it might determine whether or not to accept his proposal, he himself had been confined to a sanitarium conducted for nervous and mental diseases, and was at the time of such confinement insane. In this connection we quote the following testimony of Dr. Williamson, a man who for the period of seventeen years was first assistant physician at the Oregon State Insane Asylum, and who has for the period of twenty-six years been devoting most of his time to a practice which embraces only nervous and mental diseases. Furthermore, Dr. Williamson is known throughout the entire Northwest as a man of ex-



traordinary ability and unquestionable integrity. His testimony was as follows:

“Q. Now, state in detail the conversation, if any, which you had with Mr. Moats during his confinement to this sanitarium, and your diagnosis of his case at that particular time.

A. Well, I will be unable to give the conversation verbatim; I could give you substantially such parts as I remember. The first interview I had with him I spoke to him at considerable length, and he told me of his condition.

Q. Do you remember approximately the date of that, doctor?

A. It was the day that he was brought to the sanitarium. It was—I believe it was March 21, 1911. He was there twice, six days the first time, and then he came back April 11th and remained about seven days. He told me about his inability to sleep and about his being troubled with hallucinations and illusions. He had a belief that his spirit would leave his body and go out into the world, or had done so, had gone out, and would return to him, and he also had a belief that the devil was accompanying him and had been for some time, not continuously, but frequently, and that the devil would whisper words to him, tell him to do things, and there was a constant fight being maintained by him against the devil to resist these advices or entreaties, or whatever they were, and he realized that at times he had been unable to control himself as against that influence; made that apparent by suggesting to me that he wished to be restrained at night for fear that under this influence he would be incited to the commission of some overt act which he did not wish to do. He talked coherently, expressed himself clearly enough and had a fairly intelligent knowledge of events upon which he could discourse, but when he approached the line of his delusions he lost control, and was conscious that he had lost control at times, and was very much worried about it, and consequently he was in a state of tension. His countenance was anxious and troubled, and at times



fearful. He seemed to feel that he was a victim of something that he could not control and which he was very anxious to control. He could be reasoned with up to a certain point, following it in accord, until after the final termination theoretically of what was being said he would come back with the idea, well, that he could not help believing that it was true. He could reason out that it was not true, yet the feeling which came from his perverted condition impelled him to believe that it was true. That was the mental state in which I first found him.

Q. What, if anything, did he say, doctor, with reference to the prior history of these delusions—prior to the date when you first met him?

A. He spoke about their having existed previously, but I could not say precisely as to the time.

Q. Could you approximate?

A. It seems to me like it was weeks or months. I wouldn't be sure, something of that kind, and the nervous trouble with the insomnia had existed still longer, but there was, as I recall it, an increasing development of the symptoms in the frequency of the approach to him and in their intensity."

Transcript of Record, 286, 287, 288.

Dr. Williamson's testimony in this particular is further corroborated by the following testimony of Mr. Baldwin:

"Q. State the conditions and circumstances under which you first became acquainted with Mr. Moats.

A. Why, Mr. Moats came there on the 21st day of March, 1911.

Q. Just speak a little louder.

A. Mr. Moats came to the sanitarium on the 21st day of March, 1911, or thereabouts.

Q. For what purpose did Mr. Moats come to the sanitarium?

Mr. Cochran: Objected to as immaterial, and the witness is not qualified to state, and hearsay.

Q. I withdraw the question. State, Mr. Baldwin, in detail the general physical and mental condition of

Mr. Moats at the time he came to the Mountain View—I withdraw that question. Did you, Mr. Baldwin, act as an attendant to Mr. Moats while at the Mountain View Sanitarium?

A. Why, I was one of them. There was two of us taking care of him.

Q. During how long a period of time and to what extent did you attend Mr. Moats?

A. The first time he was there about six days. Of course I was around him part of the time and took care of him part of the time.

Q. Now state to the jury, Mr. Baldwin, the general physical and mental condition of Mr. Moats at the time—at the first time he came to the Mountain View Sanitarium, giving in detail his own statements made to you, if any, with reference to his general condition.

Mr. Cochran: Objected to as incompetent, immaterial and irrelevant. Possibly some of that question would be competent. Some of it I think is not, because the witness is not qualified to state.

Court: He can describe in general the condition. He is not giving an opinion as to the ailment. If he was a nurse he knows the condition and can detail it.

Mr. Cochran: Save an exception.

Court: The exception is allowed.

A. Why, Mr. Moats was in a very nervous state when he came there and very restless. Didn't sleep very much, and said he came there as he was afraid he might become violent, and also for treatment too. He never had hurt any one, but he didn't know but he might possibly—said he was possessed of an evil spirit, claimed that the devil was after him most of the time. At times said that he was all right—other times, why, he had this evil spirit. He talked on religious matters most of the time. That seemed to be his—

Q. A little louder.

A. He talked of religion most of the time and so—and he said that he had written a letter to his people back East previous to his coming there that the world was coming to an end, he thought. He didn't say what time—but I have forgotten now—and that he must

rectify that by writing back again that he didn't think it was. Otherwise from that he was just about the same during the six days he was there the first time.

Q. Now, Mr. Baldwin, on what date did Mr. Moats come to the Mountain View Sanitarium the second time?

A. On the 11th day of April, 1911."

Transcript of Record, pages 236, 237, 238.

Furthermore, Mrs. Moats, the plaintiff in this case and the defendant in error now before this court, the individual who accompanied Mr. Moats when he procured these policies, and the individual who is to reap the benefit of their payment if this judgment is not reversed, testified as follows upon direct examination:

"Court: You know when he was taken to Portland?

A. That was—

Court: The 21st of March.

A. Yes, yes. Well, we saw Dr. Loughlin—was it that morning? It seems to me it was that morning he saw Dr. Loughlin.

Q. The morning the evening of which he went to Portland?

A. Yes, Dr. Loughlin went to Portland with him that night."

Transcript of Record, page 399.

The following testimony of Mr. McCall, which stands undisputed upon the face of the record, shows conclusively that the Insurance Company had no knowledge of any of these facts until the 1st day of August, 1911. His testimony reads as follows:

"Thirty-sixth Interrogatory:

When and how did the defendant first learn that the person named as the insured in the policy in controversy in this suit was suffering from nervous trouble and insomnia when he made his application for this insurance?"

Answer to the thirty-sixth interrogatory:

"On the 1st day of August, 1911, from the proof of death No. 2, received that day, which consisted of physician's statement made by Dr. James W. Loughlin."

Transcript of Record, page 135.

Again:

"Firty-third Interrogatory:

After the receipt of Dr. Loughlin's affidavit, a photographic copy of which forms a part of McCall's Exhibit E, what action, if any, did the defendant take with respect to investigating the facts in regard to the representations made by the decedent to the defendant as shown by his application?

Answer to forty-third interrogatory:

"It sent a man from its home office to Summerville and La Grande, Oregon, to investigate the truth of the statements made by Mr. Moats to the defendant, as shown by the original exhibit, of which McCall's Exhibit A is a copy."

Transcript of Record, page 138.

Again, the undisputed testimony of Mr. Haskell was as follows:

"Twenty-third Interrogatory:

When did you first receive any notice or knowledge that said George S. Moats had been treated by a physician on the 16th day of March, 1911?"

Answer to twenty-third interrogatory:

"On the 1st day of August, 1911, when I received Dr. Loughlin's physician's statement No. 2."

Transcript of Record, page 204.

Again, Mr. William Stoddart, after testifying that he was a member of the Classification Committee of the New York Life Insurance Company, to



which had been presented the application of George Scott Moats for insurance, testified as follows:

“Seventh Interrogatory:

You may state what you did with reference to that application, when and where?”

Answer to the Seventh Interrogatory:

“On the 24th day of March, 1911, McCall’s Exhibit A, consisting of the application of George Scott Moats, \* \* \* came into my hands as a member of the defendant’s Classification Committee. I there examined the papers, read over the application, \* \* \* and those papers showed by the statements made therein that the applicant was a satisfactory risk, \* \* \* and therefore I approved the application.”

Transcript of Record, page 363.

This last testimony shows that on the 24th day of March, 1911, when, under the undisputed testimony of the case and the admission of the plaintiff herself, Mr. Moats was in a sanitarium, this company was passing on his application for insurance. The above testimony of Messrs. McCall, Haskell and Stoddart was taken pursuant to a notice duly served upon the attorneys for the defendant in error, which notice appears on pages 113 and 114, also on pages 325 and 326 of the Transcript of Record. The defendant in error, therefore, had ample opportunity to examine these parties and had ample opportunity at the trial to produce evidence which would contradict them, but neglected to do either of these things. It will, therefore, be no excuse for her counsel to argue that these witnesses were three thousand miles away and that she had no opportunity to meet this evidence.



The undisputed testimony of Mr. Lewis with reference to delivery is as follows:

“Q. Mr. Lewis, I hand you these two policies of insurance, plaintiff’s Exhibits 1 and 2, and ask you to look at them and state to the jury whether you had anything to do with the delivery of them?

A. Yes, sir.

Q. State what you did in that regard.

A. When the policies came I went to a phone and—what we call our rural phone, and phoned down to Moats’ home to know if I should hold the policies until he came to town or should I mail them. The answer—

Q. Do you remember when that was?

A. That was April 6th.

Q. 1911?

A. Yes.

Q. Go on.

A. And I mailed the policies.

Q. Were those the instructions you received on the phone?”

A. Yes, sir.”

Transcript of Record, pages 281, 282.

We have then an admitted state of facts which discloses that five days after a man had made application for insurance in a company whose home office was located three thousand miles distant from the place of making the application, the applicant was confined to a sanitarium conducted for nervous and mental diseases, and was according to his own statement mentally unbalanced and had been in a nervous state for a long time prior thereto, and continued to remain in this condition and to be at the sanitarium while the company to whom he had applied was still examining his application and undetermined whether to accept it, and that such company had no knowledge of anything but a

perfect condition of health shown by the applicant's own written statements until almost two months after the applicant himself was dead. The question arises whether or not there is any rule of law applicable to such a state of facts when the policies were not delivered to the insured until sixteen days after his confinement to the sanitarium and his attack of insanity. The answer to the question is that there should be no need of a rule of law to determine what should be done in the condition presented. The natural rules of common honesty and fair dealing demand that a contract procured under such conditions be branded as void; and we venture to say that could the unfortunate man whose brain became tortured and his life eventually destroyed by his own fear of the hereafter and his religious zeal, now speak, he would concur in the application of these just and wise principles to the facts of this case.

The elementary rules of municipal law, however, are themselves in accord with the rules of natural law, and it was long ago decided by the Supreme Court of the United States in the case of *Ogden v. Saunders*, 12 Wheat. 212, 6 L. Ed. 606, 651, that the obligation of a contract had its origin in the natural law, and all that the municipal law did was to provide a method for the enforcement of the natural obligation. This rule was announced by Chief Justice Marshall in the following language:

"So far back as human research carries us we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights or broken contracts. We find that power apply-

ing these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract and the obligations created by contract to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation."

Ogden v. Saunders, 12 Wheat. 212, 344: 6 L. Ed., 606, 651.

There is no rule of natural law, however, which recognizes the existence of any obligation where one of two contracting parties, possessing knowledge which he knows would prevent the other party from completing the contract, proceeds to induce such a completion without a disclosure of such facts. Much more rigorous is the rule and much more vicious the concealment where the knowledge of such facts is beyond the reach of the party deceived thereby. In fact the most elementary rules of substantive contract law recognize this principle of natural law in the well known and fundamental rule that no contract can exist until there has been a meeting of the minds of the parties; and in the application of this rule it has many times been held

that any change in the subject-matter of a contract, pending the negotiations therefor, unknown to one of the contracting parties, defeats even the possibility of a contract because it prevents a meeting of the minds. Two minds cannot meet concerning a physical object which is non-existent.

The principle is so elementary as to need no citation of authority. If one negotiates to buy a house, and pending the negotiations the house is destroyed by fire, no contract of purchase can thereafter be executed because the subject-matter concerning which the negotiations were had is no longer in existence. A party might negotiate for the purchase of a cargo on the high seas, but if pending such negotiations the cargo sinks to the bottom, no contract concerning the same can ever be completed. As was stated by the Supreme Court of New Jersey:

“A nonentity cannot be made the subject of a sale.”

Wood v. Sheldon, 42 N. J. Law 421.

And again:

“If one buys bread he does not expect a stone; if he bargains for fish he is not satisfied with a serpent.”

Smith v. McNair, 19 Kan. 330.

In the case at bar the applicant, George Scott Moats, applied to the plaintiff in error for a contract of life insurance. As a basis for the procurement of this contract he made certain statements concerning his life history and presented himself for physical examination to the agent of the company. The company in considering his application relied solely upon the written statements of the said Moats and the written description of his physical condition.



**"Thirty-third Interrogatory:**

On what, if you know, did the defendant rely in acting upon Mr. Moats' said application for insurance?"

Answer to thirty-third interrogatory:

"Upon the declarations made by him to the defendant's medical examiner, as shown in the original, of which McCall's Exhibit A is a copy, supplemented by the medical examiner's report."

Testimony Mr. McCall, Transcript of Record, page 134.

Again:

**"Nineteenth Interrogatory:**

Upon what, if you know, did the defendant base its acceptance of Mr. Moats' said application, McCall's Exhibit A?"

Answer to nineteenth interrogatory:

"Solely upon the belief that the declarations made by him to the defendant's medical examiner, as shown by McCall's Exhibit A, were true, as well as the other statements contained in McCall's Exhibit A."

Testimony Mr. Harrison, Transcript of Record, page 334.

**"Thirteenth Interrogatory:**

Upon what, if you know, did the defendant base its acceptance of Mr. Moats' application, McCall's Exhibit A?"

Answer to thirteenth interrogatory:

"Solely upon the belief that the statements contained in McCall's Exhibit A were full, complete and true as they are therein claimed to be."

Testimony William Stoddart, Transcript of Record, page 365.

The above testimony stands upon the face of the record undisputed.



Thus it affirmatively appears that while the company to which Mr. Moats had made application for a contract of insurance was considering his application and relying solely upon his own statements concerning his physical health and his physical appearance <sup>in fact</sup> to the company's medical examiner, and it is admitted by all the witnesses in the case that Mr. Moats was a man of extraordinary, striking physical appearance, this applicant was suffering from one of the most vicious and insidious of all diseases and in restraint at a sanitarium. The application of Mr. Moats gave a word picture of a healthy man. It was upon this word picture that the company was relying in negotiating for a contract with him. But the physical man described in this word picture was a human wreck long before the negotiations for this alleged contract were ever completed, and of this fact both the deceased and the woman who is now claiming the benefits of this alleged contract of insurance as beneficiary, had knowledge, while on the contrary the company had no knowledge until almost five months thereafter. How then can it be argued that the minds of the parties ever met with reference to the subject-matter of this contract.

This case would seem to be almost an isolated instance, but fortunately we are enabled to turn to an adjudication wherein the principles here applicable have been very clearly expounded and ably applied in a case involving life insurance. The case was that of *Cable v. United States Life Insurance Company*, 111 Fed. 19, 26, and comes from the Circuit Court of Appeals for the Seventh Circuit.

“It is a general rule that meditated silence, there being no duty to speak, will not avail to avoid a contract. There being no duty to communicate intelligence, the one party is not bound to speak, although he may know that the other party lies under a mistake. This is because the parties are dealing with each other at arm’s length. But even in such case the *suppressio veri* must rest in silence, not in partial and misleading statement. The latter amounts to *suggestio falsi*; for, as it has well been said, ‘a half truth is often the greatest of lies.’ If one would deal at arm’s length he must remain silent. He may not speak that which is certain to deceive and suppress that which would challenge attention, disclosing the truth. If the matter be with respect to a material fact which, if known to the one party and not to the other, would, if disclosed, induce that other to refrain from contracting, either wholly or upon the terms proposed, the one having knowledge of the fact, if under no duty to disclose, may not by a partial statement throw the other party off his guard when disclosure of the truth and the whole truth would have prevented his action.

There is, however, a class of contracts, not arising in confidential relation, where there is a duty to speak, where silence is tantamount to fraud, because ‘the silence goes to the very essence of the transaction, preventing the existence of any contract, when the transaction takes the form of contract, for want of union of minds between the parties.’ Bigelow, *Frauds*, 594. This class of contracts comprehends many subjects, and especially the subject of insurance. Thus in marine insurance the applicant owes the duty of disclosure. If he conceals a material fact, whether or not he be inquired of concerning it, the policy is void, even though his silence arose from error of judgment and not from fraudulent intent. This is sometimes rested upon the ground that the silence is a breach of the condition precedent of every contract of marine insurance, ‘that the insured shall make full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made.’ *Blackburn v.*

Vigors, 12 App. Cas. 531; Arn., Ins. (4 Eng. Ed.) 512. Thus, where insurance was applied for upon a vessel 'lost or not lost,' the applicant knowing of its loss, but concealing his knowledge from the insurer, the court held the concealment to be a fraud destroying the validity of the contract, remarking (page 670, 15 Wall., and page 247, 21 L. Ed.): 'When the company came to make this instrument they were entitled to the information which the plaintiffs had of the loss of the vessel.' Insurance Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246. So also with respect to fire insurance it has been held that if one knowing of a conflagration near his property, without disclosing the fact, procure insurance of an underwriter ignorant of the fact, the contract is void. Bufo v. Turner, 6 Taunt. 338. A well considered case upon the subject of disclosure with respect to fire insurance is Insurance Co. v. Harmer, 2 Ohio St. 452, in which it is held by Ranney, J., that the doctrine of concealment as understood in marine insurance is not applicable in its full extent to fire policies, because the corpus is subject to inspection by either party, but that the assured must not misrepresent or designedly conceal a fact of unusual peril to the property not with reasonable diligence discoverable by the insurer or anticipated as a foundation for specific inquiry.

In respect of marine insurance, one reason for the requirement of disclosure is that the corpus is often not accessible to the insurer, and reliance must be placed upon the good faith of the insured. In this respect life insurance is more nearly allied to marine than to fire insurance. It is true that a medical examination will ascertain many things necessary to be known; but there is a large field of inquiry which cannot be so disclosed, and which may be essential to the risk to be assumed. The past history of the insured, the diseases with which he had been afflicted, the duration of life of his ancestors, and their diseases, are all matters which go to the question of the assumption of the risk, and of which the insurer would naturally desire information. So, also, in the interval between the medical examination and the execution and delivery of the policy a serious change

in the health of the assured may have occurred of which the insurer might be, and probably would be, wholly ignorant. The insurer has therefore a right to rely upon the utmost good faith upon the part of the assured, and though the latter may not be bound to communicate, if uninquied of, all the details of his life which might affect the judgment of the insurer with respect to the assumption of the risk, he is certainly bound to disclose any impending peril to life not known to the insurer and of which the latter cannot reasonably be said to be put upon inquiry. It is the custom of insurance companies to act upon written or printed applications signed by the applicant, containing answers to questions propounded. Generally, as is the fact here, by the terms of the contract the application is made part of and attached to the policy of insurance. In such case the answers to the questions are warranties, and no suggestion of immateriality of the question and answer can be entertained, because it is for the insurer to judge of the materiality of the information demanded and of the reasons that shall determine the assumption of the risk.

In the case at bar, Cable in the application was inquired of whether he had ever been subject to or had pneumonia, to which he gave a negative answer. This application being made part of the contract, the statement is a warranty, and is so declared to be by the application. This statement, in the law, refers not merely to the date of the application, but to the time of the completion and delivery of the contract. And if, after the statement is made, a material change occur before the contract is consummated, the duty of disclosure on the part of the assured, or the one receiving delivery of the policy for him, is absolute. The application of Cable covenanted that the policy should take effect only 'upon payment of the first premium, and delivery of the policy during my lifetime, sound health and insurable condition.' The statements in the application of good health and freedom from disease, and specifically from pneumonia, constitute a warranty of the contract as though declared simultaneously with the delivery of the policy. If there had been a change in health between the date



of the application and the delivery of the policy the company was entitled to know of it and to be fully informed concerning it, that it might determine whether, notwithstanding such change, it would consummate the agreement and deliver its policy; for, as stated in *Traill v. Baring*, 33 Law J. Ch. 521, 9 Law T. (N. S.) 708, on appeal 10 Law T. (N. S.) 215, if a person make a representation which is calculated to induce another to assume a particular liability, and the circumstances are afterwards, before the liability is assumed, so altered to the knowledge of the person making the representation that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it the alteration in these circumstances, and a court of equity will not hold the person to whom he made the representation to be bound by any contract entered into upon the faith thereof, unless such communication has been made. In *British Equitable Ins. Co. v. Great Western Ry. Co.*, 38 Law J. Ch. 132, 10 Law T. (N. S.) 476, in July a declaration was signed for insurance upon life containing reference to the usual medical attendance of the proposed assured, who certified that the proposed assured was in good health. The assured was also required to state who was 'his latest, if other than his usual, medical attendant.' It was provided in the letter accepting the proposal and in the receipt for the first premium that if any change had taken place in the health of the assured since the date of the medical examination it would render the policy void. In August the assured consulted another physician, who discovered his patient to be suffering from disease of the kidneys. This fact was not communicated to the company, and the policy was delivered in September. Eight months afterwards the assured died of disease of the kidneys. It was held that the requirement to disclose his last medical attendant was a continuous one up to the date of the completion of the contract; that the non-communication of his visit to the physician in the interval between the signing of the application and



the taking of the policy voided the policy. This decree was affirmed upon appeal. 38 Law J. Ch. 314, 20 Law T. (N. S.) 422. In *Morrison v. Muspratt*, 4 Bing. 60, one was represented to the insurers in December of a certain year by a physician as enjoying ordinarily a good state of health. This representation was repeated in March following, and the insurance was effected in April. Between December and March the person had been ill with a pulmonary attack, and was attended by a physician other than the one who had made the representations to the insurance company, but no disclosure of the circumstance was made to the insurer. In April, a year after the issuance of the policy, the assured died of pulmonary disease. This was a case of mere representation, not of warranty, and the court held that the facts of the illness and of the attendance of the other physician should have been disclosed. See, also, *Rose v. Society*, 11 Ct. Sess. Cas. (2d Series) 345; *Society v. McElroy*, 49 U. S. App. 548, 28 C. C. A. 365, 83 Fed. 631. In *Insurance Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610, the applicant being in extremis, a friend paid the premium, but concealed from the agent the condition of the applicant. The agent delivered the policy in ignorance of the facts. The court held there was no valid contract, saying (page 380, 92 U. S., and page 612, 23 L. Ed.): 'It cannot for a moment be contended that while parties are still in negotiation as to the terms of a contract, one of them, learning of a total change in the condition of the subject-matter of the contract of which the other is ignorant, can at that moment accept terms which he has refused before, and by so doing bind the party who has offered those terms when the condition of affairs was wholly different;' and at page 381, 92 U. S., and page 613, 23 L. Ed.: 'To hold that when he was in extremis, an hour or two before he breathed his last, a friend should pay this small sum to an agent of the company, without the agent of the company having any idea of the condition of the dying man, and thus secure an obligation to pay his administrator \$5000 within sixty or ninety days, is to affirm that one party to a negotiation can delay his assent to the terms of the contract until

the changes of fortune enable him to reap all the benefits and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory.' There was, therefore, here both a warranty of good health and insurable condition at the time of the delivery of the policy, and whether the statements of the application be treated as warranty or as representations, they were continuing up to and were effective as representations or warranties at the time of the delivery of the policy. 1 May, Ins. (11th Ed.), Sec. 190. Independent of these considerations, and growing out of the very nature of the subject-matter, there was the legal obligation resting upon Cable, and upon those acting for him, to disclose any material change in his condition of health between the time of the application and the time of the delivery of the policy."

Cable v. United States Life Ins. Co., 111 Fed. 19, 26-30.

Again the same principles were announced and adopted by the Circuit Court of Appeals for the Eighth Circuit in the following case:

"Fraud vitiates all contracts. But misrepresentations or concealments of the facts relative to the health of those whose lives are insured are peculiarly fatal to contracts of life insurance, because the companies necessarily rely upon the statements and acts of the assured in making their contracts. Companies cannot know and surgeons cannot discover by the appearance and examination of subjects many insidious and often fatal diseases, the symptoms of which are felt by their victims. Hence the companies require them to answer many questions as to their habits, their health, their symptoms, the longevity of their ancestors and the causes of their decease. When these have been answered and the examining surgeon has certified to the good health of the subject and the character of the risk upon his life, these answers and this certificate become the basis of the contract. In other words, the honesty, good faith

and truthfulness of the person whose life is insured form the actual foundation of the agreement of life insurance. It is for this reason that contracts of life insurance are said to be *uberrimae fidei*, and any material misrepresentation or concealment is fatal to them. When the representation of good health and the certificate of the surgeon have been made, and the contract is not immediately closed, but negotiations for it continue, and proposals and counter proposals are made, but for some time none are accepted, the representation and certificate continue and condition all the proposals and the ultimate contract when it is closed. They are all made in reliance upon the continued truth of the representation and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject. The nature of this contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject-matter, his own life, the ignorance of the insurance company concerning it, and its necessary reliance in making the contract upon his good faith, honesty and truthfulness impose upon him the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed. An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract. The policy in this case cannot be sustained in the face of the intentional concealment by McElroy and his agent, Miss Doty, of the radical change in the condition of its subject-matter after the negotiations were commenced, and before they were closed, from a condition of robust health and probable long life, upon which they were based and were proceeding, to one of dangerous illness, of a critical surgical operation and of imminent death. The intentional concealment of this change and the misleading representation of continued good health and actual business life, inflicted a flagrant fraud upon this company, which is fatal to the contract of insurance unless it was completed before McElroy was attacked with appendicitis. *Insurance Co. v. Wolff*, 95 U. S. 326, 333; *Insurance Co. v.*

Ewing, 92 U. S. 377, 380; Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368, 373; Dungan v. Insurance Co., 46 Md. 469, 498; Marshall v. Insurance Co., 58 N. Y. Super. Ct. 406, 11 N. Y. Supp. 700; Grand Lodge v. Cressey, 47 Ill. App. 616; Carter v. Boehm, 3 Burrows, 1905; Morrison v. Muspratt, 4 Bing. 60, 62; Huguenin v. Rayley, 6 Taunt. 186; Buny., Ins. (3d Ed.) 37, 38, 51, 52; Insurance Co. v. Lawrence, 2 Pet. 25, 49; McLanahan v. Insurance Co., 1 Pet. 170, 185; Nippolt v. Insurance Co., 57 Minn. 275, 278, 59 N. W. 191; Bates v. Hewitt, L. R. 2 Q. B. 595, 604; Tate v. Hyslop, 15 Q. B. Div. 368, 377; Blackburn v. Vigors, 12 App. Cas. 531. No valid contract of insurance, therefore, was made or closed after June 27, 1894, and the only question at the close of the trial was whether or not such a contract had been made before that day."

Equitable Life Assur. Soc. v. McElroy, 83 Fed. 631, 636-637.

In the case at bar the applicant represented amongst other things as follows:

"9. Have you ever had or suffered from any of the following diseases? \* \*

A. Of the brain or nervous system? No. \* \*

10. Have you ever suffered from any diseases not mentioned above?

A. Nothing except grippe and acute dysentery. \* \* I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that to the best of my knowledge and belief I am a proper subject for life insurance."

Transcript of Record, pages 152, 153, 154.

The above statements, forming part of the application of Mr. Moats, stand undisputed upon the record of this case. It is admitted that the representations were made. It is admitted that they



were made on the 16th day of March, 1911. It is undisputed that the alleged contract of insurance was not delivered until April 6, 1911. It is undisputed that on the 21st day of March, 1911, Mr. Moats was confined to the Mountain View Sanitarium at Portland, Oregon, an institution conducted for nervous and mental diseases, and was at the time of such confinement insane; at least it does not seem that any sane man could read the undisputed testimony of Dr. Williamson above set forth and still continue to doubt the insane condition of the mind of George Scott Moats.

In order to arrive at a proper determination of this case it is necessary only to apply the rules laid down by two different United States Circuit Courts of Appeal in the cases of *Cable v. United States Life Ins. Co.*, and *Equitable Life Assur. Soc. v. McElroy*.

The rule laid down in both of these cases is that the representations made by an applicant for insurance are not mere isolated statements which may be true at the moment they are made and false the next moment, but are continuing representations and "condition all the proposals and the ultimate contract when it is closed. **They are all made in reliance upon the continued truth of the representations and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject.**" (83 Fed., bottom page 535.) "**Whether the statements of the application be treated as warranty or as representations, they were continuing up to and were effective as representations or warranties at**



the time of the delivery of the policy." (Cable v. United States Life Ins. Co., 111 Fed., bottom page 29.)

The application of these rules to the admitted facts of the case at bar lead to a result which no sophistry and no argument can evade. The false contention that a poor widow is here fighting a great mutual insurance company cannot change the undisputed fact that Mr. Moats on the 16th day of March, 1911, represented that he had never suffered from any disease of the nervous system or brain, and that within a period of five days thereafter and long before the alleged contract of insurance was completed, or in fact long before his application had been passed upon or accepted, he had undergone a change of health, the materiality of which was proven by his own death within less than three months thereafter. We are not dealing in this case with mere speculations and theories. The truth of the unfortunate facts concerning the life and death of Mr. Moats has not only been removed beyond the realms of controversy, but has been so conclusively established that nothing can ever change or alter it save the repeal of natural law.

Furthermore, the case of Cable v. United States Life Ins. Co. also announces the rule that regardless of the character of representations made and regardless of whether or not they are continuous, still common honesty and fair dealing require that, pending negotiations for a contract of insurance, the failure of an applicant to disclose to the company a material change in health, of which the company is ignorant, is a concealment which will avoid the con-

tract. Counsel for the defendant in error will doubtless attempt to distinguish the case of *Cable v. United States Life Ins. Co.* by arguing that it appears from the facts in that case that the application was made upon the express agreement that the applicant should be in an "insurable condition at the time of delivery," but the very case, the effect of which he is thereby trying to avoid, after discussing this precise question as to good health and the insurable condition at the time of delivery of the policy, continues:

"Independent of these considerations (i. e., the representations as to good health and insurable condition), and growing out of the very nature of the subject-matter, there was the legal obligation resting upon Cable, and upon those acting for him, to disclose any material change in his condition of health between the time of the application and the time of the delivery of the policy."

*Cable v. United States Life Ins. Co.*, 111 Fed.  
19, 29.

How much more proper should be the application of these rules in instances where the applicant himself has expressly agreed that the contract shall not take effect until delivery. The complaint filed in the case at bar alleged the execution and delivery of a contract of insurance. This the defendant denied and alleged that, relying on the representations of the applicant that he had never suffered from any disease of the nervous system or brain or any other diseases not mentioned, which representations were false, it delivered to him an instrument purporting to be a contract of insurance. The law says that these very representations which were pleaded

were continuous representations from the day they were made until the contract was attempted to be completed by the alleged delivery. The law further says that if, pending negotiations for this contract, a material change in the subject-matter of the negotiations had taken place, which change was known to the applicant but not to the insurance company, it was the legal as well as the moral duty of the applicant and those acting for him to make known these facts to the company.

The plaintiff in error has invoked the benefit of these rules by every possible method known to procedure. It was necessary to wait until all the evidence was in before this proposition could be urged, and as already shown, this matter was presented to the court for consideration even before the case was submitted to the jury, and the court being in doubt, reserved his ruling but submitted the case nevertheless. Immediately the plaintiff in error moved for a judgment notwithstanding the verdict on this reserved ruling, which motion was reviewed at length and afterwards denied. The plaintiff in error then moved to set aside the judgment and grant a new trial on the ground that the judgment was against the weight of evidence, and this was denied. It now comes before this court and asks protection of its rights as against the self apparent deception which has been imposed upon it.

The rules of law which it invokes are not arbitrary or vicious rules used to oppress the weak or aid the strong. Besides, the plaintiff in this case cannot be classified as among the weak, because she admitted on cross-examination, over the objection

of counsel, that she had inherited from her first husband four hundred and twenty (420) acres of land.

“Q. And you were living on the farm there at Summerville?

A. Yes, sir.

Q. And which you inherited from your husband?

A. Yes, sir.

Q. How large a farm was that?

A. Four hundred—

Mr. Cochran: We object to that line of cross-examination as being immaterial and improper cross-examination.

Court: Goes to the credibility of the witness.

Mr. Cochran: Save an exception.

Court: Exception is allowed.

A. Shall I answer?

Mr. Cochran: Yes.

A. Four hundred and twenty acres.”

Testimony of Mrs. Moats, page 77, Transcript of Record.

Counsel for Mrs. Moats endeavored to show by redirect examination that her interest was only a dower interest, but this very endeavor only goes to show how the law has protected a woman in her circumstances. Furthermore, she admitted that there were only three children living who would participate with her in this land, one of whom had died and to whose interest she had fallen heir. (Page 77, Transcript of Record.) We refer to this testimony only for the purpose of meeting the contention which will be advanced that the rules of law sought to be invoked for the protection of the plaintiff in error should not be invoked in a case where a poor unfortunate widow is fighting a great



mutual life insurance company. Such considerations are, of course, immaterial except as hollow argument used to produce possible prejudice.

Regardless of these considerations, however, these rules, as we have stated, are not cruel or vicious rules, but are the mere outgrowth of those fundamental rules of moral law which society has been compelled to establish for its own protection. They merely require that an applicant for life insurance be as fair to the company which is to furnish the insurance as he expects the company to be fair to him. If cases of this kind are allowed to stand then the individual who honestly seeks life insurance will be purchasing protection where none exists, because the very company which attempts to furnish him with such protection is itself unprotected against the assaults of those who wittingly or unwittingly lead the company by means of concealment to insure individuals whose physical health is completely undermined.

As was long ago stated by the great Daniel Webster:

"Society may be protected against murder but cannot be guarded against suicide."

So life insurance companies may protect themselves against frauds where there is some physical evidence of disease, but cannot protect themselves against the concealment of diseases known only to the individual himself.

No more perfect illustration of this fact can be produced than is the present case. Of all the diseases known to mankind there is none so insidious and subtle in its workings as diseases of the brain.



Even those within the immediate household and those within close association may be unaware of its encroachment. There might even be instances wherein the victim himself was unaware of his condition. Such cannot be the case, however, where, as in the present instance, the victim himself is confined to a sanitarium and even asks to be restrained, fearing himself the results of the disease within.

Instances of this kind have necessitated the announcement of the rules laid down in the cases of *Cable v. United States Life Ins. Co.*, and *Equitable Life Assur. Soc. v. McElroy*. Both cases recognize that negotiations for contracts of life insurance demand the utmost fidelity on the part of the applicant because companies are compelled by virtue of the very position which they occupy to rely upon the honesty, integrity and good faith of the applicant. As was well stated by Judge Sanborn in the case of *Equitable Life Assur. Soc. v. McElroy*, 83 Fed. at page 636:

“Companies cannot know and surgeons cannot discover by the appearance and examination of subjects many insidious and often fatal diseases, the symptoms of which are felt by their victims.”

And again as stated by Judge Jenkins in the case of *Cable v. United States Life Ins. Co.*, 111 Fed. at page 26:

“‘A half truth is often the greatest of lies,’ and in cases of this kind ‘silence goes to the very essence of the transaction, preventing the existence of any contract, when the transaction takes the form of contract, for want of union of minds between the parties.’”

It is admitted by the undisputed testimony presented on the trial of this case that had this com-

pany known even of Mr. Moats' inability to sleep it would not have accepted his application. As shown on page 335 of the Transcript of Record, Mr. Harrison was asked the following question:

"Suppose Mr. Moats in his declarations to the medical examiner, as evidenced by McCall's Exhibit A, had said in answer to question No. 11 that he had consulted a physician that day for insomnia and nervousness, giving the name of the physician, would you or not have approved, or would the defendant have accepted his application for insurance?

Answer to Twenty-first Interrogatory:

No.

Twenty-second Interrogatory:

Suppose Mr. Moats in answering Question 9 in the declarations to the medical examiner, instead of answering 'no' to the question as to whether or not he had ever suffered from any disease of the brain or nervous system, had said in answer thereto that he was then suffering from insomnia—what effect, if any, would such answer have on the defendant's action on McCall's Exhibit A?

Answer to Twenty-second Interrogatory:

It would have had a very material effect. The defendant would not have accepted the application.

Twenty-third Interrogatory:

Why?

Answer to Twenty-third Interrogatory:

Because insomnia is a serious mental disorder, and a person who is suffering from insomnia is not an insurable risk, for insomnia is likely to result within a comparatively short time either in insanity, suicide or other calamity. Of course it does not always so result, but as affecting an application for life insurance it must be and always is treated as a very serious disorder, making the person suffering therefrom entirely uninsurable at the time."

Suppose the condition in which Dr. Williamson found Mr. Moats on the 21st day of March, 1911, as portrayed by the perfect word picture presented by the testimony of the renowned doctor above stated, had been made known to the Insurance Company while they were passing upon the application of Mr. Moats, would they have accepted his application? This question itself is an insult to the intelligence of any sane individual. No matter how greedy the company might have been, no matter how anxious its agent to earn a commission, no matter how lax its methods, it would have been an act of business suicide to have accepted this risk. In fact it would have been a deliberate fraud upon all of the policy holders of the New York Life Insurance Company. This cannot be denied. How then can it be maintained that the failure of Mr. Moats and those acting for him to disclose these facts to the company was not of itself a fraud sufficient to avoid this contract. If it would have been a fraud for the company to have accepted his application with knowledge of these facts, it must follow that the concealment of these facts, whether intentionally or otherwise, was itself a fraud.

Furthermore, if it could for a moment be logically contended or legitimately held, that the plaintiff in error had failed to sufficiently plead the facts concerning the condition of Mr. Moats subsequent to the date of his application for life insurance, by reason of its alleged failure to label one part of its answer as that part which related to events occurring prior to his application, and the other part as to those events occurring subsequently to his applica-

tion, and if the technical argument that the Company had admitted a delivery by alleging a reliance upon his false representations and the consequent delivery of an instrument purporting to be a contract of insurance, can receive recognition in a court of justice, nevertheless we maintain that to sustain the judgment in the present case would be to countenance an act which is in direct contravention of public policy and therefor void. Under such circumstances the universal rule is that regardless of defenses pleaded, the court will of its own motion dismiss the case, "not for the sake of the defendant, but of the law itself."

The undisputed facts in this case disclose that the officers of the New York Life Insurance Company, which the record shows to be a mutual company, approved the application of an insane man; and this act, whether done wittingly or unwittingly, is a legal fraud upon all of the policy-holders of this Company, as well as a legal fraud upon every American citizen in whose interest and for whose benefit these great mutual life insurance companies are now being conducted. We venture to assert that there is no commercial enterprise in which the public at large is so deeply interested and so directly concerned as in the business of life insurance. It therefore follows that for a court of justice to recognize by its solemn judgments the admitted act of an insurance company's officers in approving the application of an insane man would be "subversive of sound morality" and sustain the result of an act which the law would in the first instance prohibit.

It has been directly held that a provision making



a life insurance policy incontestable from date is contrary to public policy, null and void, as tending to put fraud on a par with honesty. This rule was announced by the Supreme Judicial Court of Massachusetts in a comparatively recent case. The language of the court is too persuasive to admit of comment, and we therefore proceed directly to the following quotation:

“But this clause purports to make the policy incontestable for any cause from the date of issue. We must assume that the defendant issued the policy on the faith of the fraudulent representations, without discovering the fraud, or, so far as appears, having any opportunity to discover it, before the contract was made. It is true that it might have declined to issue a policy until it should take time to investigate the matters represented. If it had postponed making the contract for a considerable time, and had investigated the subjects to which the representations related, and had then issued a policy, inserting in it a provision that, having made an examination of the material matters stated by the insured, it was so far convinced of the truth of his statements that it would waive its right afterwards to set up fraud as a defense to the claim, a different question would have been presented. It might then appear that the contract was not induced by reliance upon fraudulent representations, but by an investigation which the defendant conducted, on which it relied. There is nothing to show that the policy was not issued immediately upon the receipt by the company of the report containing the false statement. The company was not bound to postpone the making of the contract. It had a right to enter into it, relying upon the report which was founded on the false representations.

We think the question intended to be presented by the report of the judge is the same as if the plaintiff's intestate had gone into the home office of the defendant



and had made material representations as inducements to the issuing of a policy, and the defendant's manager had said: 'I will give you a policy, relying on your representations. I do not know whether they are true or false; but, however false and fraudulent they may be, the company will never avail itself of the fraud as a defense to a suit upon the policy,'—and had then given him a policy containing this clause. Will the court enforce an agreement never to set up fraud in defense to a contract, when the contract is made in reliance upon material representations that may be true or false? This question has been considered in its application to contracts of insurance. In *Wheelton v. Hardisty*, 8 El. & Bl. 232-283, Lord Campbell interpreted a provision that a contract should be indefensible, as meaning indisputable, 'subject to an implied exception of personal fraud, which will vitiate every contract.' In *Massachusetts Ben. Life Assn. v. Robinson*, 104 Ga. 256, 42 L. R. A. 261, 30 S. E. 918, the court said: 'A policy providing generally that it should be incontestable from its date, but silent on the subject of defending upon grounds originating in fraud, would still be a valid contract. The waiver of the right to defend on the ground of fraud not being the subject of express stipulation, the law would imply that the insurer intended to reserve to himself the right to defend upon that ground. If, however, the policy stipulated that it should be incontestable from its date, and the insurer should not be allowed any defenses, whether originating in fraud or otherwise; or if it were clear from the terms of the contract that it was the intention of the parties that fraud should not be a defense,—then such a contract would be void as being opposed to the policy of the law.' In *Welch v. Union Cent. Ins. Co.*, 108 Iowa, 224-230, 50 L. R. A. 774, 78 N. W. 853, substantially the same doctrine is clearly stated. To the same effect is *Bliss*, Ins. 1st ed. Sec. 247; 2d ed. Secs. 254, 255. All the cases in the first group of the above citations discuss the incontestability of policies, after the lapse of a specified time, upon grounds that imply the existence of the same rule of law,

THE REASONS FOR THE ENFORCEMENT OF SUCH A RULE ARE PARTICULARLY STRONG WHEN ONE OF THE CONTRACTING PARTIES IS A MUTUAL INSURANCE COMPANY, ALL THE MEMBERS OF WHICH SHARE IN THE PROFITS AND LOSSES.

There are various cases which forbid companies to make contracts of life insurance that are against the policy of the law. In *Ritter v. Mutual L. Ins. Co.*, 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300, it was held that a contract to insure one against suicide would be against public policy. Mr. Justice Harlan, in the opinion, said: 'A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment.' An agreement to be bound by a contract which the parties are making, in spite of subsequently discovered fraud by which it was obtained, would be subversive of sound morality. In *Hatch v. Mutual L. Ins. Co.*, 120 Mass. 550, 21 Am. Rep. 541, this court held that there could be no recovery under a policy of life insurance when the insured knowingly and voluntarily exposed her life by submitting to a criminal operation which proved fatal."

*Reagan v. Union Mut. Life Ins. Co.*, 189 Mass., 555; 76 N. E. 217.

The portion of the above decision which has been capitalized appears as such only in our quotation, not in the original opinion. We have made this capitalization for the purpose of calling to the attention of the court the specific reasons given in the case cited for the application of the rule announced, since the same reasons apply to the case at bar, because the New York Life Insurance Company is a mutual company. This fact appears from the face of the

policy sued upon in this case shown upon page 3 of the transcript of record:

"The proportion of divisible surplus accruing on this policy shall be ascertained and distributed annually and not otherwise, and at the option of the insured."

Transcript of Record, page 3.

"Q. State whether or not the New York Life Insurance Company is a mutual company?

A. It is."

Testimony H. P. Lewis, pages 108, 110 Transcript of Record:

If it is against public policy for a life insurance company to make its policies incontestable from date on the ground that some period of time should be allowed for the discovery of fraud, it logically follows that the act of an insurance company's officers in unwittingly approving the application of an insane man is likewise against public policy, because regardless of their intention, it is a fraud upon all policy-holders and the public at large to whom the company holds itself out as an organization transacting a bona fide business. This very reasoning was recognized by the Supreme Court of the United States in a case holding that a life insurance policy could not insure against the legal execution of the insured for crime. In this case Mr. Justice Brewer, quoting from an English decision, used the following language, which is by analogy support of our contention:

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year upon condition that, in the event

of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money,—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes,—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went, at least, altogether void?”

Burt v. Union Central Life Ins. Co., 187 U. S. 362, 364, 47 L. Ed. 216, 218.

It would certainly be against public policy for the officers of the insurance company to deliberately contract with an individual who was non compos mentis. Not only would such a contract be voidable at the instance of the insured, but would be a fraud upon all other policy-holders and the public, and if sustained would open an avenue for the most flagrant abuses by the officers of an insurance company. There is, of course, a basic distinction between insuring against the possibilities of insanity as a disease and insuring the disease when in existence.

If the officers of the New York Life Insurance Company had deliberately approved the application of the insane Moats, such act would, of course, have



been branded by the courts as against public policy. The result, however, in so far as the other policy holders and the public at large are concerned, is identically the same, whether the act of the insurance company's officers was wilful or not wilful. It therefore follows upon the theory announced in the citation above quoted from *Burt v. Union Central Live Insurance Company*, 187 U. S. 362, that if the act of the officers in approving the application of the insane Moats was in the first instance against public policy, it would be just as much against public policy after the act has been completed.

It therefore follows that regardless of the superficially technical distinction that the pleadings in the case at bar are insufficient to support the contention that Mr. Moats was insane when his application was approved and consequently no contract could have been completed, because of the violation of the continuing representation, nevertheless the act of the company's officers in approving the application of an insane man being an act in contravention of public policy, imposes upon this court the duty of dismissing the case regardless of any defenses which may have been pleaded. The rule is universally recognized and everywhere adopted that whenever illegality appears from the face of a case, such disclosure is fatal to the case and no act of the parties can prevent or waive the inevitable result of a dismissal. The following language of Justice Swayne is conclusive upon this proposition: .

"The instruction given to the jury, that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendants, was founded



upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

Hall v. Coppel, 74 U. S. 542, 558; 19 L. Ed. 244, 248.

It has also been held by the Supreme Court of the United States, in the case of Ritter v. Mut. Life Ins. Co., 169 U. S. 139; 42 L. Ed. 693, that a contract of life insurance providing for payment if the insured committed suicide, was against public policy as tempting and encouraging crime. The same case held, however, that:

"If the suicide or self-destruction takes place when the insured is insane and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money."

Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 160; 42 L. Ed. 693, 700.

To hold therefore, that a life insurance company could issue a policy upon the life of an insane man,

would be to open the door for an evasion of the rule that a contract insuring against suicide is contrary to public policy, for as above stated, if suicide is committed by an insane person, the prohibitive rule does not apply. It is no less contrary to public policy to countenance an act which directly contravenes the law than to countenance an act which indirectly contravenes the law. In fact, the indirect contravention is by reason of its subtlety the more dangerous. To sustain the judgment in the present case would be to hold that a life insurance company could approve the application of an insane man and would thereby not only be subversive of sound morality and the public good, but likewise lend countenance to a method whereby to evade the rule prohibiting insurance against suicide; because they could insure an insane man against acts of suicide and when the contract was attacked as being against public policy, invoke the exception above cited and claim that the rule did not apply in cases of insane persons. Furthermore, the courts will take judicial notice of the fact, that a disposition to commit suicide is one of the common propensities of insane persons.

Mr. Justice Harlan, in the case of *Ritter v. Mutual Life Insurance Co.*, 169 U. S. 139, laid down a rule by which may be tested the legal validity of a life insurance company's act in approving the application of an insane man. The rule referred to is as follows.

“A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court

of justice, or be made the foundation of its judgment.”

Ritter v. Mutual Life Insurance Co., 169 U. S. 139, 160.

The admitted act of the insurance company's officers in the case at bar, in approving the application of an insane man, positively endangers the public interests and injuriously affects the public good.

We therefore urge that the action of the trial court in refusing to direct a verdict for the plaintiff in error and in refusing thereafter to set aside the verdict and enter judgment for the plaintiff in error, notwithstanding the verdict, should be reversed and a judgment now entered in favor of the plaintiff in error upon the admitted facts shown by the record of this case.

The second error of which the plaintiff in error now complains is the refusal of the trial court to direct a verdict in its favor upon the ground that it appeared from the undisputed testimony that prior to the 16th day of March, 1911, and prior to his application for insurance in the New York Life Insurance Company, George Scott Moats consulted several physicians for nervousness and sleeplessness, and had suffered from nervousness and sleeplessness and a disease of the brain, in direct contradiction of his own written representations to the contrary. It will be remembered that Mr. Moats stated in his application in answer to the question whether or not he had consulted a physician within five years that he answered, “Once three years before for a pain in the back,” designating as the

physician N. Molitor, La Grande, Oregon. He was further asked if he had suffered from any disease not mentioned, to which he answered "no."

The testimony offered by the Insurance Company for the purpose of establishing the falsity of Mr. Moats' representations concerning the consultation of physicians began with the testimony of Dr. Molitor, which appears on pages 97 to 106, inclusive, of the Transcript of Record in this case. The doctor testified in substance that Mr. and Mrs. Moats were in his office on March 3d and on March 4, 1911; that Mrs. Moats came to consult him on March 3d, and at that time he had a conversation with Mr. Moats; that he made a short examination of Mr. Moats and found him to be suffering from neurasthenia, a term used by the medical profession to designate the lack of nerve force; that he fixed the date March 3d owing to the existence of a charge on his books against Mr. Moats for that date, which was verified by the fact that on March 14th Mr. and Mrs. Moats came into his office and paid him a fee for the previous examination, and upon their leaving his office at this time he recollected that he had collected the fee before, and called them back from the foot of the stairs to return the second payment, which was an overcharge; that at the time of their conference on March 14th he made no complete examination of Mr. Moats, but found him suffering from neurasthenia produced by overwork.

The evidence offered next was the testimony of Dr. Zimmerman, which appears on pages 246 to 258, inclusive, of the Transcript of Record. Dr. Zim-



merman testified that Mr. Moats had consulted him on the 18th day of March, 1911, at which time Mr. Moats stated to him that he was very nervous and could not sleep, and wanted a general physical examination; that he diagnosed Mr. Moats' case as that of a man suffering from severe mental strain and commonly called neurasthenia, and recommended to him the osteopathic treatment as a cure for his disease. In this connection we desire to direct attention to the following excerpt from the testimony of Mrs. Moats:

"Q. Are you acquainted with G. W. Zimmerman, an osteopath?

A. I never met him but one time.

Q. When was that?

A. That was the time— \* \* \* I was up there with my husband."

Transcript of Record, page 400.

"Q. State whether or not he told Dr. Zimmerman that he was very nervous and could not sleep.

A. He never told Dr. Zimmerman very much of anything. Very few words were said between them, and I asked the doctor myself what they treated on, and he said mostly they treated on the back, and he commenced to explain about the nerves of the back," \* \* \*

Transcript of Record, page 402.

"Q. State whether or not he told Dr. Zimmerman that he was worried.

A. He never in my presence."

Transcript of Record, page 403.

"Q. Tell the jury what about that warning that Dr. Zimmerman gave as there only going to be two endings of your husband, insanity or death.

A. I never heard anything about insanity or death mentioned in my presence, and I was with him all the



time. He never mentioned such a thing to my husband. He only told him, 'If you take treatments of me a few times I will make a well man of you.' "

Transcript of Record, page 404.

"Q. Mrs. Moats, what did you and your husband go to Dr. Zimmerman's office for?

A. My husband went to see just what osteopathic work would do.

Q. Do for what?

A. He never had attended an osteopath's work and he just wanted to see what their treatment was.

Q. Do for what?

A. Well, for anything.

Q. You just went there out of idle curiosity, is that it?

A. More than anything else. There really was nothing the matter with the man at the time."

Transcript of Record, page 404.

We cite the above testimony of Mrs. Moats to show the kind of evidence which the trial court held sufficient to negative the long line of testimony of various well known doctors as well as the admissions of Mr. Moats himself. It will be observed that her denials are not positive but merely to the effect that such and such did not transpire in her presence. Furthermore, the statement that she and her husband went to the office of an osteopathic doctor out of idle curiosity destroys the effect of her testimony as a denial.

The next testimony was that of Dr. Loughlin, which appears on pages 259 to 267, inclusive, of the Transcript of Record. Dr. Loughlin testified that he first met Mr. Moats on the 16th day of March, 1911, about 10 o'clock in the forenoon, and was informed by Mr. Moats that there had been some re-

vival meetings at Summerville, Oregon, which he had attended and had become unduly excited along religious lines. The doctor further stated that he advised a change of environment, suggested going to a sanitarium in Portland and prescribed for him a nerve sedative. The doctor further stated that the man seemed to be in a very good condition physically and except for the existence of a highly nervous condition, which Mr. Moats himself attributed to his religious excitement. The doctor further testified that he was again called to the bedside of Mr. Moats on the 20th day of March, 1911, at which time Mr. Moats told him he hadn't been able to sleep any and he found his nervous condition much worse than it was when he examined him on the 16th day of March. Mr. Moats told him at this time that the devil was speaking to him; that the principal trouble was that he wanted him to do something that he didn't want to do; that the man's principal thought was to the effect that the devil was having a bad influence over him. In connection with the testimony of Dr. Loughlin, we direct attention to the following testimony of Mrs. Moats found on page 399, Transcript of Record:

"Court: You know when he was taken to Portland?

A. That was—

Court: The 21st of March.

A. Yes, yes. Well, we saw Dr. Loughlin—was it that morning? It seems to me it was that morning he saw Dr. Loughlin.

Q. The morning, the evening of which he went to Portland?

A. Yes. Dr. Loughlin went to Portland with him that night."

Transcript of Record, page 399.

We further desire to direct attention to the fact that proofs of death submitted by Mrs. Moats as a basis for recovery in the present action contain the sworn statement of Dr. James W. Loughlin, M. D., of La Grande, Oregon, the same doctor whose testimony we have just referred to, in which statements are found the following questions and answers:

“9. How long had you been the medical attendant or adviser of deceased?

Since March 16th.

10. a. For what diseases did you treat or advise deceased prior to last illness?

a. Nervousness and sleeplessness.

b. Give date, duration and result of each.

b. March 16th.”

Transcript of Record, page 179.

We have called the particular attention of the court to the above testimony of Mrs. Moats for the reason that she corroborates Dr. Loughlin in every particular, save as to the fact that Mr. Moats consulted him on the 16th day of March, 1911. She undoubtedly thought it safe and perhaps better to admit the consultation of March 20th, but knew, of course, that the admission of the consultation on March 16th would be vital. The doctor, however, did not change his testimony as to either occasion, and, of course, was prompted by no motive. On the theory of continuing representations above set forth, however, the admission as to the undisclosed consultation of March 20th is as vital to her right of recovery as the admission of the consultation on March 16th.

Following the evidence of Dr. Loughlin came the testimony of Dr. Upton found on pages 267 to 279, inclusive, Transcript of Record. Dr. Upton testified that some time during the early part of the year 1911, and he thought prior to March, although he wouldn't be positive, Mr. Moats consulted him and stated to him that he was nervous and sleepless, complained of inability to sleep and of nervousness; that he diagnosed Mr. Moats' case as that of neurasthenia, which he explained to be nerve exhaustion, and that based upon the history of the case which he himself had and the matters contained in the hypothetical question propounded he thought that this nervousness for which Mr. Moats was consulting him was the incipient form of insanity of which he died. The doctor further testified on cross-examination that he found no organic lesion of any kind and that outside of his nervousness and sleeplessness he was a very healthy looking man. Dr. Upton further testified, as shown on page 282 of the Transcript of Record, that Mrs. Moats herself asked him concerning the insurability of Mr. Moats, and he in reply made some remark concerning the nervous condition of Mr. Moats and gave them a negative answer.

Dr. Williamson then testified to the effect that he first met Mr. Moats on the 21st day of March, 1911, at which time he found the man possessed of the idea that his spirit would leave his body and go out into the world, or had done so, and he also had the belief that the devil was accompanying him and had been for some time, not continuously, but frequently, and that the devil would whisper words



to him, tell him to do things, and there was a constant fight being maintained by him against the devil to resist these advices.

“Q. What, if anything, did he say, doctor, with reference to the prior history of these delusions—prior to the date when you first met him?

A. He spoke about their having existed previously, but I could not say precisely as to the time.

Q. Could you approximate?

A. It seems to me like it was weeks or months. I wouldn't be sure, something of that kind, and the nervous trouble, with the insomnia, had existed still longer, but there was, as I recall it, an increasing development of the symptoms in the frequency of the approach to him and in their intensity.

Q. Now, doctor, isn't it a fact that delusions in themselves are as much evidence of insanity as manic insanity itself?

A. They are, yes.”

Transcript of Record, pages 287, 288.

Dr. Williamson also testified in answer to a hypothetical question outlining the evidence of the case and also the observations which he himself had made, that in all probability the nervousness and sleeplessness from which Mr. Moats was suffering prior to the 16th day of March, was the incipient form of the insanity from which he died.

Dr. Tamiesie of the Oregon State Insane Asylum, next testified, as shown on pages 297 to 317, inclusive, of the Transcript of Record, that he had attended Mr. Moats while at the Oregon State Insane Asylum and very vividly described the unfortunate mental condition of Mr. Moats during his entire stay, showing that the afflicted man was suffering from a severe case of insanity; that he entertained delusions, was fearful of some oncoming



disaster and seemed to brood more particularly upon religious matters. The doctor further testified that the man was constantly in fear of being poisoned, and the intensity of his condition grew with the disease until he became very noisy and violent and had to be restrained and even given opiates; that as a result of his refusal to take food as well as the nervous strain under which he was laboring, he died on the 14th day of June, 1911, of manic depressive insanity. On cross-examination the doctor testified as follows:

“Q. You don’t know whether Mr. Moats was insane on March 16th and prior thereto or not, do you?

A. I believe he was.

Q. You believe he was?

A. Yes, sir.

Q. You believed it from what you knew afterwards or from his condition on the 16th?

A. I believe it from my personal investigation of the case after he appeared at the insane asylum, and from the subsequent history and from the evidence I have heard here in this case.

Q. Having sat here and heard the testimony?

A. Yes, sir.

Q. What type of insanity did he have on the 16th day of March?

A. My diagnosis was not made at that time.

Q. No, but then from—

A. But the ultimate diagnosis was manic depressive insanity.

Q. That was on the 14th of June?

A. Yes, sir.

Q. But you are unable to classify his condition on the 16th day of March, are you?

A. I would classify it in a similar manner.

Q. Similar manner?

A. Yes, sir, similar classification.

Q. Do you have any evidence of his being in a depressed condition on the 16th day of March?

A. Well, from his own statements—the personal observation of the case after he came under my care. I have his own statement.

Q. He said he was depressed on the 16th of March?

A. Yes, sir—well, not necessarily the 16th of March, but previously—had been depressed for some time.

Q. And was he—were other propositions connected with it outside of the depression?

A. Well, statements that he had been unduly interested in religious matters. He dwelt upon this subject to the extent that he couldn't sleep; often found himself in a dreamful state, as he expressed it to me a number of times. Later, when he became more disturbed, he explained that he was there being sanctified or receiving sanctification, detailing it a little more closely."

Transcript of Record, pages 315-317.

The Dr. Tamiesie just referred to is the same Dr. Tamiesie whose statement Mrs. Moats submitted in connection with the proofs of death as a basis for the recovery in the present case, which statement appears on pages 184, 185, 186, 187 of the Transcript of Record.

Now, the only evidence offered for the purpose of contradicting this unbroken line of testimony from these professional men whose reputation can not be questioned, is the mere naked negation of Mrs. Moats upon cross-examination, and in one instance upon direct examination, the instance referred to being the alleged visit to Dr. Loughlin on the morning of March 16, 1911. In other words, Mrs. Moats testifies to a negative and mere denial, whereas, the several doctors who testified against her testified to affirmative facts within their knowledge and positive admissions that Mr. Moats had

made directly to them, and under such circumstances the rule obtains that as between witnesses of equal credibility the one who testifies to an affirmative fact is to be believed as against the one who testifies to a negative, on the theory that one may forget a thing which did happen but can not possibly remember a thing that never happened. This rule was announced by the Supreme Court of the United States in the case of *Stitt v. Huidekoper*, 17 Wall. 384; 21 L. Ed. 644.

“One of the errors assigned and insisted on grows out of this conflict in testimony between the plaintiff and the two defendants, all of whom were sworn \* \* \*. On this subject the court charged the jury that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed. We are of opinion that the charge was a sound exposition of a recognized rule of evidence, of frequent application, and that the reason of the rule as stated in the charge, dispenses with the need of further comment on it.”

*Stitt v. Huidekoper*, 17 Wall. 384, 394; 21 L. Ed. 644, 647.

Again:

“The evidence of a witness who swears positively to a thing, or emphatically says that he saw something, is more valuable than that of witnesses who say they did not see.”

*Rhodes v. United States*, 79 Fed. 740, 743.

Mr. Moats may have consulted physicians and Mrs. Moats may have known nothing about the consultation, although the entire evidence taken

would seem to establish that she had a knowledge of these visits, which she now attempts to deny.

The court very properly instructed the jury that the undisputed evidence of the case established that the questions propounded to Mr. Moats concerning his consulting physicians and concerning his health were material to the risk.

Transcript of Record, page 428.

In view of the long chain of unbroken testimony establishing a continuous sequence of consultations with physicians concerning nervousness and sleeplessness long prior to the 16th day of March, 1911, and corroborated by the testimony of Doctors Williamson and Tamiesie to the effect that Mr. Moats himself had admitted to them that he had for weeks or months prior to his confinement in the Mountain View Sanitarium on the 21st day of March, 1911, and his subsequent confinement in the asylum, suffered from sleeplessness and nervousness and delusions, negatived only by the attempted denial of Mrs. Moats, and in view of the rule that the evidence of a negative character is to be rejected as against evidence of an affirmative character, we respectfully submit that the trial court erred in refusing to direct a verdict for the plaintiff in error, which action should be reversed and the proper judgment now entered.

Upon the trial the plaintiff in error requested the court by form of a written instruction to instruct the jury that if a man makes a representation as of his own knowledge not knowing whether it be true or false and it is in fact untrue, he is



guilty of fraud as much as if he knew it to be untrue, and if they found from the evidence in the case that George Moats did on the 16th day of March, 1911, represent to the plaintiff in error that he never had any disease of the nervous system or brain or that he had not consulted a physician within five years from the date of such representation, except three years prior for a pain in the back, and they further found that the deceased had suffered from a disease of the nerves or brain or had consulted physicians more than once within five years from the date of the representation, and should further find that such representations were in fact untrue, then the verdict must be for the plaintiff in error. The court refused to grant this instruction, and to its refusal an exception was duly taken and allowed.

See pages 433, 434 and 435, Transcript of Record.

The rule of law in this particular as announced by the Supreme Court of Oregon, which case was presented at the trial, is as follows:

“If a man, says Mr. Kerr in his work on fraud, makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, he is guilty of fraud as much as if he knew it to be untrue.”

Bonelli v. Burton, 123 Pac. 37, 39 (Oregon, April, 1912).

Had this instruction been given to the jury they might possibly have found that Mr. Moats, without any absolute or convincing knowledge of his own disease, had made the representations which



he did make thinking they were true, and had the jury been thus instructed their verdict might have been for the plaintiff in error proceeding upon this theory of law, which was withheld from them.

We therefore respectfully submit that for the errors herein discussed the present judgment should be reversed and a judgment entered in favor of the plaintiff in error or else a new trial granted.

PLATT & PLATT,  
Attorneys for Plaintiff in Error.

**United States  
Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT**

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**NEW YORK LIFE INSURANCE COMPANY,**  
a corporation,

Plaintiff in Error,

vs.

**IDA M. MOATS,** guardian of the person and estate  
of **GEORGE A. MOATS,** minor,

Defendant in Error.

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**BRIEF OF DEFENDANT IN ERROR**

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Upon Writ of Error from the District Court of the  
United States for the District of Oregon.

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**STATEMENT OF THE CASE.**

On March 16, 1911, Henry P. Lewis, an agent of the New York Life Insurance Company, induced Mr. George S. Moats, a prominent farmer of Union County, Oregon, to apply to him as the agent for two policies of life insurance of \$5,000.00 each. (Transcript, 395.)

Lewis produced an official form of application No. OC. 106948, with receipt attached (see McCall's Ex.

C., Trans., 163), to be detached if the premiums were paid in connection with the application.

Lewis filled out an application (Trans. 396), and took Mr. Moats to the company's medical examiner, where the usual medical examination was had, a record in writing made of it which was signed by Mr. Moats, and the premium of \$134.15 paid on each policy.

This medical examination showed Mr. Moats to be a perfect specimen of physical manhood and highly satisfactory to the company. His risk was better than the average. Mr. Moats was a man of good habits, well liked by his neighbors, and whose reputation for honesty, and uprightness of life was above reproach. "No man could deny his honesty," using the words of one witness.

See Testimony of William R. Challin, Trans., 408.

John H. Newbill, Trans., 410.

D. R. McKenzie, Trans., 416.

The application, medical examiner's report and the premium were immediately sent to the company, and were duly received, and the usual inspection made. (Trans., 161). By the terms of the company's proposal in the official application and receipt for premium, which was accepted by Mr. Moats, it was agreed that if a policy was later delivered to Mr. Moats he should be insured from March 16, 1911. The policy was later delivered. Mr. Moats was given to understand and as a matter of fact, believed that he was insured from the date of his application. Not long after the taking out of the insurance, Mr.

Moats consulted with Dr. Loughlin for a slight, temporary disorder, and was advised to go to Portland. At Portland he saw Dr. Williamson and others, and returned home. Later he was taken to the Oregon Hospital for the Insane where he was discharged April 18, 1911, as cured. Later he returned to the institution where he died June 14, 1911. The cause of death being assigned as maniacal depressive insanity.

When the proofs of death of Mr. Moats were received at its home office the company required an additional affidavit from Dr. Loughlin. When this affidavit was prepared Dr. Loughlin, not having kept any memorandum of the date, so far as we are informed from the record, made an error therein and declared that he first saw and consulted with Mr. Moats professionally on March 16, 1911, in the forenoon.

This error induced the company to break their contract so faithfully entered into by Mr. Moats and to charge him, in defense of their conduct, with fraudulent misrepresentation in his application for insurance.

The claims of the insurance company being so opposite to the manner of life of Mr. Moats, came as a surprise to the defendant in error.

So on September 18, 1911, she began an action against the plaintiff in error in the Circuit Court of the State of Oregon for the County of Union. Service of process was made upon the plaintiff in error on the 30th day of September, 1911. Afterwards proceedings for the removal of the cause from the state to the federal court were had and a transcript upon removal filed in the court below on the 27th day of December, 1911.

Defendant in error by her complaint declared upon a contract purporting to be a policy of insurance upon the life of her husband, George Scott Moats.

The complaint, appearing in the Transcript of Record on page 1, et seq., is in the usual form, among other things alleging in paragraph three that on or about the 16th day of March, 1911, the New York Life Insurance Company in Union County, Oregon, made and entered into a contract with one George S. Moats, late husband of the plaintiff, for the use and benefit of the plaintiff's ward, George A. Moats. This contract of life insurance was plead in *haec verba* in the complaint and the material portions for consideration here appear to be the following:

NEW YORK LIFE  
INSURANCE COMPANY

BY THIS POLICY OF INSURANCE AGREES  
TO PAY .....

.....FIVE THOUSAND ..... Dollars

at the Home office of the Company in the City and State of New York to George A. Moats, son of the insured beneficiary, with right of revocation, upon receipt at said Home Office of due proof of the death, during the continuance of this contract, of George S. Moats, the Insured.

This contract is made in consideration of the first premium of One Hundred Thirty-four 15/100 Dollars, *the receipt of which is hereby acknowledged*, constituting payment for the period terminating on the Sixteenth day of March, in the year Nineteen Hundred and Twelve. . . . .

*After delivery of this policy to the insured, it takes effect as of the Sixteenth day of March, Nineteen Hundred and Eleven.*

It will thus be seen that the policy itself acknowledges the receipt of the payment of the premium.



It was next averred in the complaint that George S. Moats on the 16th day of March, 1911, paid to the defendant the sum of \$134.15, being the first premium provided for in said contract and being the amount, the receipt of which is acknowledged by the terms of the contract and which did constitute payment for the period terminating on the 16th day of March, 1912.

Then is alleged in the complaint the fact of the death of the insured which occurred on the 14th day of June, 1911, and that the company did receive at its home office due proof of the death of said George S. Moats during the continuance of the said contract of insurance. And then follows a claim that the sum of \$5,000.00 with interest at the rate of 6 per cent. per annum from the 15th day of July, 1911, is due to the plaintiff in the case, defendant in error here, and then a prayer for judgment in accordance with the allegations of the complaint.

On the 30th day of December, 1911, the plaintiff in error filed in the court below its answer. (Transcript, pages 32, et seq.) By this answer, in a further and separate defense, the plaintiff in error contends that at the time of making of the application for the policy in question, the insured falsely answered certain questions which were submitted to him by the medical examiner of the plaintiff in error at La Grande. By reason of the alleged false answers and the materiality of them, the plaintiff in error sought to overthrow the liability upon the contract of insurance which had been established by the introduction of the policy and the proof of non-payment of the amount due thereunder. The plea of the plaintiff in error was a pure confession and avoidance. They confessed the execution and delivery of the policy and sought to avoid it by the allegation and proof of facts occurring prior to the application.

Will the court bear in mind in the consideration which will be given to this case the foregoing statement? It is fully supported by the record, references being made to paragraph three of the answer wherein appears the direct allegation that prior to the 16th of March, 1911, and prior to the making of the application for insurance, certain facts existed opposite to the answers given in the application. In other words, it is claimed that Mr. Moats was guilty of fraud when asked the questions, "Have you ever had or suffered from any of the following diseases: A. Of the brain or nervous system?" to which he answered "No," and "11. A. Have you ever been under the care of or consulted a physician concerning yourself for a cause within five years? B. If so, for what ailment? Name and address of the physician," to which he answered, "Once three years ago; and acute dysentery; and for a pain in the back. N. Moliter, La Grande."

It is further claimed that those answers were false *in that PRIOR thereto he had suffered from a disease of the brain and nervous system, had been under the care or consulted a physician in addition to the incident given by him.* Then the plaintiff in error followed this allegation by appropriate claims that they relied upon the same and knew nothing to the contrary and had no means of ascertaining the truth but believed the same to be true and so believing, executed and delivered the policy in question.

The court will please notice that on page 37 of the Transcript of Record is the direct allegation in the answer that the plaintiff in error "*did make, execute and deliver unto the said George S. Moats, as of date of March 16, 1911, an instrument purporting to be a contract of life insurance, which instrument was in words, letters and figures, substantially the same as the contract alleged in plaintiff's complaint.*"

A reply placed in issue the material allegations of the answer, admitting as alleged in plaintiff in error's answer (Transcript, page 41), "that the policy of insurance was issued as of date March 16, 1911, as set forth in the complaint."

A trial was had before the Honorable Robert S. Bean, United States District Judge presiding, beginning the 27th day of May, 1912, and a jury, resulting in a verdict in favor of the defendant in error for the sum of \$5,000.00. (Transcript, page 46.)

A judgment (Transcript, page 47), upon said verdict was entered in favor of the defendant in error and against the plaintiff in error for the amount of the verdict.

The negotiations of the parties resulting in the contract sued upon are mostly in writing.

In the first place, one Henry P. Lewis, agent of the plaintiff in error, submitted to Mr. Moats an application which was duly filled out and signed. This application appears in the Transcript at page 143 and is known as McCall's Exhibit "A." In the application is the following agreement:

"I agree as follows:

1. *That the insurance hereby applied for shall not take effect unless the first premium is paid and the policy delivered to and received by me during my lifetime and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application."*

There was no other agreement between the parties in writing or otherwise, changing the date when the policy shall take effect. It will be seen, therefore, that under this agreement two conditions necessarily had to

be performed before the contract took effect, 1. Unless the first premium is paid. 2. Policy delivered to and received by me during my life time. Both of these conditions were performed.

*There was no agreement between the parties, as is sometimes the case with insurance companies, that the policy should be delivered during life time, sound health and insurable condition, and the absence of the condition "in sound health and insurable condition" is one of the distinguishing features of this case. The plaintiff in error by the effect of its argument seeks to read such an additional condition into the contract of the parties, whereas the defendant in error is standing upon the contract as made, expecting the insurance company to be held to its terms.*

Attached to the application was a "statement to be signed by applicant upon payment of the premium or any part thereof." (See Transcript, page 146.) Moats signed this statement. In it he assented to the terms of the receipt which Mr. Lewis, the agent, gave him. The receipt in question, which was detached from the application, appears as McCall's exhibit "C." (Transcript, page 163.) An examination of this receipt (Transcript, page 163) discloses no additional agreements of the parties which in any way affect the former documents. So, therefore, the statement of the case by District Judge Bean is faithful to the facts and accurate in its details. That statement is as follows: (Transcript, page 50.)

"Actions on two policies on the life of George S. Moats, issued by the defendant company, consolidated and tried before the jury.

At the conclusion of the testimony the defendant moved for a directed verdict on the ground (1) That the assured made untrue and false statements in his



application for insurance concerning his health and having consulted a physician, and (2) That five days after the date of the application and prior to the delivery of the policy, the assured became ill with a serious mental and nervous disorder which required his confinement in a sanitarium and from the effects of which he died shortly after the delivery of the policy. *The motion was overruled on the first point for the reason that the evidence was conflicting and presented a question for the jury. The Court reserved its opinion on the second.*"

"The jury having found verdicts in favor of plaintiff, the defendant now moves for judgment in its favor, notwithstanding the verdicts, on the ground that the assured was not in sound health and insurable condition at the time of the delivery of the policy, which fact was not disclosed to the company. *No such defense is pleaded.*"

By reference to paragraph three of the answer (Transcript, page 36) the Court will observe the defense to be founded upon facts alleged to exist and circumstances said to have happened prior to the date of the application. *Nowhere in the pleadings will be found any allegation of facts existing or happening subsequently to the application.* In other words, the jury by their verdict denied the truth of the allegations of defendant's answer and we must conclude, therefore, that on the 16th day of March, 1911, the assured was in sound health and insurable condition and made and entered into an agreement with the plaintiff in error that if the insured would pay them \$134.15, at the time of the application and submit himself to a medical examination, that if the examination was satisfactory and the company shall deliver him a policy during his life time, that it would insure him in a sum equal to five thousand dollars *from March 16, 1911.*



Defendant in error alleges that the policy was effective March 16, 1911. (See paragraph 3 of complaint, Transcript, page 2.) The plaintiff in error alleges that it delivered a policy as of date March 16, 1911. (See Answer, paragraph 4, Transcript, page 37.) and the defendant in error admits that a policy of insurance was issued as of date March 16, 1911. (See Reply, paragraph 4, Transcript, 41.)

### CORRECTION OF PLAINTIFF IN ERROR'S STATEMENT OF THE CASE.

The plaintiff in error erroneously assumes (page 3, middle paragraph of its brief) that certain fraudulent concealments were made and we expressly deny that the record in this case discloses fraudulently concealed events either long continued or otherwise, and a fairer statement of the state of the record upon this question is as follows:

The plaintiff in error claimed that there had been fraudulently concealed events, commencing about three months prior to the date of the application for life insurance and continuing to the date of the application, but that these claims were controverted by the defendant in error and on the trial of the issues of fact thus formed, a jury pronounced the truth to be that no such events happened and no concealments occurred.

In the course of the argument answering plaintiff's first assignment of error, we shall show the most complete contradiction of the plaintiff in error claims and how the weight of the testimony preponderates in favor of the defendant in error.

Reference will be made to the opinion of the experts of the insurance company upon our hypothetical

questions showing the cause of death of Mr. Moats to have begun, developed and culminated in his death subsequent to the date of his application for insurance. Reference will also be made to the manner in which the witnesses testified, their demeanor on the stand, and to the record where the contradiction occurs, and we shall claim all the privileges of a common law jury trial by a common law jury.

## ANSWER TO SPECIFICATION OF ERRORS.

### I.

The Trial Court did not err in overruling the motion for a directed verdict which was made by the plaintiff in error at the close of all the evidence introduced upon the trial, for the reason that the evidence introduced upon the trial of the cause in support of the contentions of the plaintiff in error was contradicted by the evidence of the defendant in error and thus an issue of fact appeared which should be submitted to the jury.

### II.

The Trial Court did not err in overruling the motion for a directed verdict made by plaintiff in error at the close of all the evidence introduced, upon the ground that pending negotiations for the alleged contract of insurance, the applicant for insurance had become insane and his physical health irreparably impaired, for that no such grounds were submitted and all evidence of any such fraudulent events, if any there be, is immaterial to this case, there being no plea of such fraud in the answer upon which to base said testimony and it is not true that such events happened pending negotiations for a contract of insurance.

## III.

The Trial Court did not err as assigned by plaintiff in error in the third assignment, page 6 of the brief, for that said assignment is not the assignment made on page 444 of the Transcript of Record, and that it does not appear from the evidence, uncontradicted or otherwise, that the alleged contract for insurance was not to take effect until delivery but that if the first premium is paid and a delivery occurs during the life time of the assured, it takes effect as of March 16, 1911.

## IV.

The Trial Court did not err in overruling plaintiff in error's motion for a new trial upon the ground that the judgment was contrary to the weight of the evidence, for that said judgment is not contrary to the weight of the evidence but wholly in accord with it, and, moreover, the weight of the evidence is for the jury.

## V.

The Trial Court did not err in refusing to give the instructions set forth in the fifth assignment and error cannot be predicated thereon in this court for the reason (a), said claim of error is not contained in the assignment of errors served upon defendant in error and filed on the 30th day of September, 1912 (see Transcript of Record, pages 442, 443, 444, 445, 446 and 447) and (b) that the substance of said instruction is contained in the general instructions given by the trial court and (c) that it contains matters wholly foreign to the evidence in the case, in particular the following portion: "Or that no other company had ever declined to issue a policy upon his life or either

of them” and the following “and had been rejected as an applicant for insurance in any other insurance company.” There is nothing in the pleadings or evidence to support such ideas.

## POINTS AND AUTHORITIES.

### I.

The defense of fraud, in failing to disclose change of health occurring subsequently to date of application not being pleaded, is waived. The courts cannot undertake to pass on matters not thus involved.

Adcock vs. Oregon Ry. Co., 45 Ore. 173.

Blackburn vs. Lewis, 45 Ore. 422.

Thayer vs. Buchanan, 46 Ore. 106.

Kastor vs. Storey, 47 Ore. 150.

Boothe vs. Farmers Bank, 47 Ore. 299.

Walker vs. Goldsmith, 14 Ore. 125, 132, 146.

### II.

A party will not be permitted to recover on a claim or theory that is not pleaded.

Swank vs. Swank, 37 Ore. 439, 445.

Bartholomew vs. Durby, 61 Am. St. Rep.  
57, 61.

## III.

The "Act of Conformity" adopts the State system of pleading and practice "as nearly as may be."

U. S. Rev. St. Sec. 914.

4 Fed. St. Anno. Sec. 563.

The defense in this action must conform to state procedure.

Bates Fed. Procedure at Law, Sec. 1034.

Roberts vs. Lewis, 144 U. S. 653, 658.

## IV.

The defendant in error is entitled to have the issues tried according to the course of the common law. This means a common law jury and a common law jury trial.

Bates Fed. Procedure at Law, Sec. 1054.

## V.

All issues of fact must be submitted to and decided by the jury.

Bates Fed. Procedure at Law, Sec. 1093.



## VI.

By delivering the application to the assured for his signature, a proposal is made by the Insurance Company that if the assured will fill out the application and answer the medical examiner's questions, insurance will be given him in accordance with the terms of the application if the premium be paid and the policy of insurance delivered during life time. If a policy be delivered during life time, the premium having previously been paid, and a date be fixed for the beginning of the insurance, such date controls and precludes the parties.

## VII.

Where a policy of insurance purports to insure for one year from a date named, a provision or claim that the risk shall not commence until a specified time after the date named, is inconsistent with the provisions as to duration of risk and is therefore void.

Bean vs. Etna Life Ins. Co., 78 S. E. 104.

## VIII.

Contracts of insurance will be liberally construed in favor of the insured and strictly construed against the insurer and generally all ambiguities limiting or avoiding liability under the contract will be resolved against the insurer.

Fenton vs. Fidelity and Casualty Co. of N. Y.,  
36 Ore. 283.

McMaster vs. New York Life Ins. Co., 78  
Fed. 33.

First Cooley, Briefs on the Law of Insurance,  
page 632.

## IX.

The issuance of a policy of insurance is an acceptance of the application therefor, and is based on the status at the time such application is made and is not affected by a subsequent change of health, that being a part of the risk the company assumes and for which it is paid.

Grier vs. Mutual Life Ins. Co., 132 N. C. 542,  
44 S. E. 38.

Going vs. Mutual Benefit Life Ins. Co., 58  
S. C. 201, 36 S. E. 556.

Fried vs. Royal Ins. Co., 50 N. Y. 243.

Cahan vs. Continental Life Ins. Co., 69 N. Y.  
300.

Kendrick vs. Mutual Ben. Life Ins. Co., 124  
N. C. 315, 32 S. E. 728.

## X.

Delivery of policy not necessary. Where premium is paid and application accepted equity will insure delivery of the policy.

Hebert vs. Mutual Life Ins. Co., 12 Fed. 807  
(Ore.).

## XI.

The condition "delivery during sound health" will not be inferred if not stated in the contract. The insurance company assumes the risk of any change in health.

Grier vs. Life Ins. Co., Supra.

Going vs. Mutual Benefit Ins. Co., Supra.

Schwartz vs. Germania Ins. Co., 18 Minn 448,  
21 Minn. 215.

Fried vs. Royal Ins. Co., Supra.

Cahan vs. Cont. Life Ins. Co., Supra.

## XII.

It is a general rule that statements in the application refer only to the time when they are made.

Richards vs. Manhattan Ins. Co., 31 Mo. 518.

Levie vs. Metropolitan Life Ins. Co., 163 Mass.  
17, 39 N. E. 792.

World Mutual Life Ins. Co. vs. Schultz, 73  
Ill. 586.

John Hancock Mut. Life Ins. Co. vs. Daley,  
65 Ind. 6.

## XIII.

It is also a general principle that whether statements made in the application are regarded as warranties or as material representations, it is sufficient that they are true at the time they are made.

Decamp vs. N. J. Mutual Life Ins. Co., 7  
Fed. Cases. 313.

Gordon vs. U. S. Casualty Co., 54 S. W. 98.

Grier vs. Mutual Life Ins. Co., Supra.

Ins. Co. vs. Higginbotham, 95 U. S. 380.

#### XIV.

In the absence of inquiry, a failure to disclose certain facts as to the health of the applicant is not fraudulent.

Spitz vs. Mutual Benefit Life Ass'n., 25 N. Y.  
Supp. 469.

Mobile Life Ins. Co. vs. Walker, 58 Ala. 290.

3 Cooley, Briefs on Ins., page 2102.

#### XV.

The question in a life insurance application as to consultation with a physician, does not refer to slight and temporary indisposition, but to something serious and substantial.

Dobler vs. Mutual Reserve Life Ins. Co., 137  
Fed. 550, 556.

Hubbard vs. Mutual Reserve Life Ins. Co.,  
100 Fed. 719.

New York Life Ins. Co., vs. Baker, 83 Fed. 647.

Billings vs. Metropolitan Life Ins. Co., 41  
Atl. 516.

Blumenthal vs. Berkshire Life Ins. Co., 134  
Mich. 216.

## ARGUMENT.

PLAINTIFF IN ERROR IS SEEKING TO SUSTAIN A THEORY WHICH IT DID NOT PLEAD, A CLAIM WHICH IT DID NOT THINK IMPORTANT UNTIL AFTER AN ADVERSE VERDICT.

The defense of plaintiff in error to the actions upon the policies is a plea in bar. Pleas in bar are of three kinds, 1. Pleas by way of traverse or denial either general or special. 2. Pleas by way of confession or avoidance, admitting the truth of plaintiff's allegations by avoiding them and by alleging new matter, and 3. Pleas which neither admit nor deny the facts averred in plaintiff's declaration or complaint by alleging some matter of estoppel which being inconsistent with his allegations preclude him from availing himself of them.

The foregoing are the fundamental classifications of the text writers on pleading. It will therefore be seen that the plaintiff in error in this action has adopted the second class of pleas in bar; has offered a defense by way of confession and avoidance, admitting the truth of plaintiff's allegations as to the execution and delivery of the policy, the payment of the premium, the death of the assured and the non-payment of the liability, and undertakes to avoid the liability by allegations of fraud.

The Act of Conformity (U. S. Rev. St. Sec. 914) fixes the standard of pleading. In all actions at common law in the Federal Courts, the pleading or pleadings of the defendant by which he presents his defense to plaintiff's complaint must conform to the requirements of the State procedure in "like causes" of the



state in which such courts are respectively held, including the form and order of pleading and the method of stating the facts which constitute the defense and of interposing denials.

Bates Fed. Procedure at Law, Sec. 1034.

Roberts vs. Lewis, 144 U. S. 653, 657, 658.

Under the Oregon procedure, L. O. L. Sec. 73 "the answer of the defendant shall contain; 1. A general or specific denial of each material allegation of the complaint, controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; 2. A statement of any new matter constituting a defense and counterclaim in ordinary and concise language without repetition."

The right, therefore, to urge a defense on a theory or claim depends entirely upon the Oregon practice to which we should turn for a solution of the question.

*According to the decisions of the Supreme Court of Oregon, fraud, to be available as a defense, must be plead.*

In the case of

Walker vs. Goldsmith, 14 Ore. 126, 132, 146, the Court says in effect: There being no allegations of fraud, such a defense cannot be considered by the Court.

In the case of

Thayer vs. Buchanan, 46 Ore. 106,

the pleadings show a defense of fraud in securing the confession of a judgment. Afterwards and at the trial the defendant declared that this judgment was not fraudulently secured but was made of bounces given for loans, making such loans usurious and illegal.

Justice Wolverton gives his opinion, saying (page 109):

“Such a contention, however, is wide of the defense that the judgment was fraudulently confessed,”

and on page 110 says:

“The pleadings set out no such defense and we are therefore powerless to help the defendant even on account of such demands.”

In the case of *Swanck vs. Swanck*, 37 Ore. 439, Justice Moore holds that recoveries in legal proceedings must be had if at all, on the grounds stated in the pleadings. A party will not be permitted to recover on a claim or theory that was not pleaded.

The second and third assignments and specifications of error (page 5 of the Brief of plaintiff in error) contemplate and describe a theory and a claim not alleged in any respect in their answer. It is an admission that the assured was in good health on March 16, 1911, but that his health changed between that date and the date of the delivery of the policy on April 6, 1911. The answer of plaintiff in error, upon the other hand, denies that the assured was in good health on March 16, 1911, and sets up a state of facts to which evidence might be offered in support thereof. After the issues of fact as formulated by answer and reply had been submitted to a jury who pronounced upon the same in favor of the defendant in error, ingenious and able counsel sought another theory upon which to base a recovery, namely, a theory that pend-

ing negotiations, a change in the health of the assured occurred which had been undisclosed to the insurance company. It thus clearly appears that the alleged fraud in failing to disclose events happening after the application was "wide of the defense" of failing to disclose events happening prior to the application. Plaintiff in error claims at page 9 of the Brief in point VII that even though the defense is not plead, yet this court should permit them to assert it. This principle, if followed to its logical conclusion, would abolish the pleadings, permit secret defenses and pervert those valuable rules which experience has taught us facilitate and subserve the ends of justice. Any litigant that would so contend must certainly be clinging to a vanishing hope, and cannot defeat the defendant in error in her prosecution of a just claim.

For other cases supporting the principle that the failure of plaintiff in error to plead its latest discovery of alleged fraudulent concealments precludes an assertion in a court of justice, see the following cases:

Adcock vs. Ore. Ry. Co., 45 Ore. 173.

Blackburn vs. Lewis, 45 Ore. 422.

Kaston vs. Storey, 47 Ore. 150.

Boothe vs. Farmers Nat. Bank, 47 Ore. 299.

Bartholomew vs. Durby Rubber Co., 61 Am. St. Rep. 57, 61.

31 Cyc. 128.

ASSUMING BUT NOT ADMITTING THAT A CHANGE OF HEALTH OCCURRED IN THE ASSURED BETWEEN THE DATE OF HIS APPLICATION FOR AND DELIVERY OF THE POLICY, WERE ANY FRAUDULENT CONCEALMENTS COMMITTED?

The foregoing arises from the issue formed between us in plaintiff's second and third assignments of error, the plaintiff in error contending that when the assured on the 21st day of March came to Dr. Williamson's sanitarium, a duty was imposed upon him to make a disclosure of this event, and, failing to do so, the policy of insurance is avoided. The defendant in error denies this contention.

Among other cases cited to support the doctrine contended for are those of *Cable vs. U. S. Life Ins. Co.*, 111 Fed. 19, and *Equitable Life Ins. Society vs. McElroy*, 83 Fed. 631. These cases are clearly and easily distinguishable and do not apply to this case.

*Cable vs. U. S. Life Ins. So.*, 111 Fed. 19, presents a state of facts as follows:

On February 21, 1899, Cable applied for a policy of life insurance and a policy of insurance was tendered to him. Payment of premium was not made and did not accompany the application.

The application contained a stipulation that the policy should take effect only "upon payment of first premium and delivery of policy during my life time, sound health and insurable condition." On February 27th, Cable became ill. On the same day the premium was paid and the policy delivered to one Lord, a friend and business associate of Cable and who was Cable's agent. The application was made a part of



the policy contract and was therefore a warranty. On page 29 of the opinion we find the following:

“There was therefore here both a warranty of good health and insurable condition at the time of the delivery of the policy, and, whether the statements of the application be treated as warranty or as representations, they were continuing up to and were effective as representations or warranties at the time of the delivery of the policy.”

When the policy was delivered the agent of the insurance company asked, “Cable is all right, isn’t he?” Whereupon Lord says “Mr. Cable has been sick for two or three days but he is no worse than he has been for the last forty-eight hours.”

*Held:* A duty was imposed upon Cable by the contract to disclose his illness and failing to do so, his policy of insurance is void.

Why? Because he was asked to disclose.

As applying to these facts, this decision is not only correct but hundreds of cases can be found supporting the doctrine that where the assured and insurer agree that the policy shall take effect only “On payment of the first premium and delivery of the policy during my life time, sound health and insurable condition” and the policy is delivered but not during sound health and insurable condition, that such a policy is void.

The principle quoted in the Cable case, as having been announced by the English Courts in the cases of

Traill vs. Baring, 33 L. J. (N. S.) Ch. 521,

and



Morrison vs. Muspratt, 4 Bing. 60,

and

British Equit. Ins. Co. vs. Great Western Ry.  
38 L. J. (N. S.) Ch. 132

is not so universal in its application as a reading of the opinion in the Cable case would indicate. In the case of

Morrison vs. Muspratt, 4 Bing. 60,

in December, 1822, one Elgie applied for insurance and was examined by Dr. Boot. In January and February, 1823, she was sick with pulmonary trouble and consulted Dr. Bland. In March, Dr. Boot again examined her and certified good health at which time the consultation with Dr. Bland was concealed. In April, 1823, a policy was issued. The court held it to be a question for the jury whether such concealment was a sufficient misrepresentation to avoid the policy.

It will be observed that in the Cable case the judge, announcing the opinion, remarked that this case was one of "mere representation and not of warranty" and the court held that "the fact of illness and of the attendance of the other physician should have been disclosed."

*The correctness of this statement is expressly challenged for as we read the opinion in the case of Morrison vs. Muspratt, supra, the learned English court did not so hold but merely held it to be a question for the jury.*

In the case of

British Equit. Ins. Co. vs. Great Western Ry.,  
38 L. J. (N. S.) Ch. 132,

the following were the facts:

In July, 1863, one Bird applied to plaintiff for insurance. Payment of premium did not accompany the application. The notice of acceptance stated that until payment of premium the company assumed no risk and any alteration in health in the meantime would render the policy void. In August, 1863, between medical examination and payment of premium, Bird discovered a dangerous state of health from another physician, which he did not communicate to the company. In September, 1863, he paid the premium. The receipt states, "If any variation \* \* \* in health of assured since the medical examination and before payment \* \* \* receipt to be void."

*Held:* That a policy issued under those circumstances is void.

The Court will observe that the contract itself as in the Cable case, *supra*, makes representations of health continuing from the time of making the application up to the completion of the contract, that is, up to the payment of the premium.

Traill vs. Baring, 33 L. J. (N. S.) Ch. 521.

In this case P. Insurance Company insured one Taylor on May 9, 1861. May 10th, P. Insurance Company asked R. Insurance Company to re-insure, representing that one-third of the liability on the

policy should be held by each of three companies, including P. Company. Premium for re-insurance did not accompany application. On May 15th, P. Company abandoned the plan of keeping any liability itself and re-insured the balance with another company. On May 18th, P. Company paid the premium to R. Company and a re-insurance policy was issued.

*Held:* The policy was void, the Court remarking, "If a person *make a representation* calculated to induce another to assume a particular liability and the circumstances are afterwards, before liability is assumed, so altered to the knowledge of the person making the representation that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made the representation the alteration of those circumstances."

Like wise,

Equit. Life Ins. Association vs. McElroy, 83  
Fed. 631.

The assured allowed his policy to lapse and applied for reinstatement. A medical examination was made and reinstatement accepted by the company on June 14, 1894. Payment of premium did not accompany the application. June 26th, defendant was taken sick and underwent a serious surgical operation. June 28, although McElroy had often refused the policy, his stenographer was called, to whom he gave several blank checks with directions to pay the premium and secure the policy, and on the same day the stenographer went to the office of the Association and asked for the policy.

June 29th, the premium was paid and policy received. At the time McElroy was in extremis. June 30th, he died. After the death and on June 30th, interest on the premium paid. The stenographer represented that McElroy was away, but concealed that he was in the hospital.

*Held:* That the contract was not completed before the sickness and was therefore void. In a dissenting opinion by Mr. Circuit Judge Caldwell, the completion of the contract was held to be a question for the jury.

The Court will observe that there was in each and all of the foregoing cases something to be done by the assured before the contracts were completed, namely, payment of premium. At the time the *premium was paid some express false representation was made*, and in applying the law to those facts, the policies were held void. It is plainly obvious that the principles of law applied to the particular facts instanced by the cases cited are correct when the facts are considered, but they have no more application to this case than the law of gravitation.

Counsel for plaintiff in error have rather anticipated that we shall attempt to distinguish the case of *Cable vs. U. S. Life Ins. Co.* from the case at bar (see page 39 Brief of plaintiff in error), and have suggested that the obiter dicta appearing in the opinion ought to bind this court into making a rule universal which was only designed to apply to a case where the promise was that the assured should be in "good health and insurable condition" at the time of delivery and not to a case where the promise depended upon delivery "during life time." While we shall offer some suggestions calculated to show the distinguishing features between the two cases, yet, we shall rely in proof of the dis-



tion, upon adjudicated cases from the highest courts of the state and also from the Supreme Court of the United States. We shall let the opinions from these courts show the difference after having stated the facts.

In the Cable and McElroy cases there were affirmative fraudulent conditions. Affirmative false representations were made by Cable and McElroy for the purpose of securing the policies and by reason of such affirmative false representations, the policies were secured. The changed condition of health, the fear of impending dissolution, the approaching spectre of death, caused Cable and McElroy to affirmatively falsely represent in order to secure the policies. These affirmative false representations were made in answer to express inquiries on the part of the agents of the insurance companies.

The facts in the case at bar are entirely different. There is no parallel between the two. Cable and McElroy falsely answered the insurance company's questions and inquiries. *Moats did not*. Cable and McElroy did not pay the premium before any change of health. *Moats did*. Cable agreed that his policy should not take effect unless delivered "while in sound health and insurable condition." *Moats did not*. *His agreement is that the policy, if delivered during life time, shall take effect as of March 16, 1911*. McElroy, to get the policy, falsely answered, through his secretary, the inquiry as to his health. *Moats did not*. No inquiry was made. The sagacious business men in charge of the plaintiff in error must be presumed to have requested and inquired for all information they desired concerning Moats. If they asked Cable and McElroy as to their health and any change therein between the time of application and delivery of policy, why did



they not ask Moats? The only logical answer is—the information was not needed; was not desired; was not material, and the contract did not call for it. Moats, if a policy was delivered to him during his lifetime, was insured from March 16, 1911. If this be not true, Moats paid for something he did not get, namely, insurance from March 16th to April 6th. If this reasoning be not true, then the words “to take effect” mean “not to take effect.” It means that the insurance company can promise, but not fulfill. It means that the insurance company may perpetrate fraud on the insured by alluring him into the belief that the agreed effective date after all was not an effective date.

We controvert the claims of plaintiff in error as stated in their point No. 2 and assert the law to be as follows:

*A representation of good health and insurable condition made in an application for life insurance is not continuing unless (a) made so by the contract (b), or expressly reaffirmed on inquiry after application and before delivery of policy. It is sufficient if the representation is true when made.*

In the case of *Going vs. Mutual Benefit Life Ins. Co.*, 36, S. E. 556, the Supreme Court of South Carolina, July 11, 1900, had under consideration a case arising out of the following facts.

On May 4, 1898, J. D. Going made an application for insurance in writing and this, together with the certificate of the medical examiner, was sent to the home office of the company in Newark in the state of New Jersey. On the 28th of May, 1898, the assured was taken sick with what proved to be typhoid fever and on the 29th of June, tendered payment of premium, and at the time was very sick, and he subsequently died on the 2nd of July, 1898. The tender was held

equivalent to payment. The policy contained these conditions: "This policy does not take effect until the first premium shall have been actually paid during the lifetime of the insured." The Court said (page 558, bottom of page):

"It is contended, however, by the appellants that there was another condition to the delivery of the policy which was not and could not have been complied with at the time the delivery of the policy was demanded, to-wit: That the insured must then have been shown to be in good health, which was not only not shown, but, on the contrary, the testimony tended to show that assured was at the time very sick of a disease from which he died in a few days thereafter." The Court then said:

"But it is very obvious that the policy which constitutes the contract between the parties, contained no such condition, and the attempt is to raise such a condition by the testimony as to the instructions given to the local agent by the company. Whether it would be competent to annex to a written contract any other condition than that contained in the written contract is a question which we do not propose to consider at present, as no such question seems to have been made up to the time when the motion for a non-suit was submitted."

And so the court affirmed a judgment in favor of the beneficiary and refused to read into the contract a statement that the assured at the time of delivery "should be in sound health and insurable condition" which the plaintiff in error by its argument seeks to read into this contract.

The Supreme Court of North Carolina, on May 5, 1903, had occasion to consider the case of

Grier vs. Mutual Life Ins. Co., 44 S. E. 28.

The case arose on the following facts: On February 26, 1901, plaintiff's intestate made out an application for a policy of insurance upon his life, which was sent to the home office of the defendant, where it was accepted and a policy thereupon was duly executed March 9th and dated February 26th. This policy was sent to defendant's agent for delivery, who delivered the same on the 14th of March. In the meantime insured had been taken, on the 6th of March, with a chill from exposure which was followed by fever. On the 15th of March he developed catarrhal pneumonia and died the 18th of March.

*"There were no averments in the answer of fraud in the application, or in the suppression of facts, or misrepresentation as to the condition of health of the insured 14th March, when the policy was delivered."* (See page 28, 2nd column.)

Again the Court said:

"When, therefore, the application was accepted and the policy was issued 9th March, it dated back to 26th February. There only remained the delivery of the policy to complete the contract. The provision in the application that the contract shall not take effect until the first premium shall have been paid during the applicant's continuance in good health, is only a provisional agreement, authorizing the company to withhold the delivery of the policy until such payment in good health; but, when the company actually delivers the policy, then it is estopped, in the absence always of fraud, to assert that its solemn contract is void, either on account of nonpayment of premium or of ill health, which stipulations were asserted in the application as conditions to excuse it from such delivery, and are not grounds to invalidate the

policy after it has been delivered. \* \* \*  
 There is no stipulation that the policy shall not be delivered unless the insured is in good health, for that would unjustifiably shift off upon the insured any mortal illness accruing after the application, and during the time for which he has paid. But the agreement is that the first premium must be paid during good health, and, in the absence of fraud, the delivery of the policy is conclusive of that fact." (Page 29.)

It will be remembered that there were no averments in the answer of misrepresentations as to the condition of health of the insured March 14th when the policy was delivered.

The Court further said:

"It was contemplated by the parties that the payment should be made with the application and that the receipt then given should protect the insured from that date, if the application were accepted. *The issuance of the policy is acceptance of the application, and should be based upon the status at the time the application is made, and is not affected by a subsequent change of health, for that is part of the risk the company assumed, and for which it was paid.*"

The plaintiff in error fails to comprehend the difference between a case where the insured was asked as to a change in his health and lied about it and a case where he was not asked and had a contract rendering such information unnecessary, and learned counsel for plaintiff in error points with hope and great pleasure to the Cable and McElroy cases, declaring himself, at page 28 of the brief, to have been fortunate in being able to turn to those adjudications; But when we remember that the Cable case was before a court that



had no jurisdiction of the case and no right to consider it, the authority of the opinion is relieved of its quality as a precedent and reduced to the plane of an ordinary text writer discoursing upon an instant case.

The Cable case was reversed by the Federal Supreme Court on jurisdictional grounds. (See 191 U. S. Page 288.)

The McElroy case is decided by a divided court. The opinion of Mr. Circuit Judge Caldwell being unanswerable when he held the question as to when the contract was completed between McElroy and the Equitable to have been a question for the jury. He says:

“If the contract of insurance was complete before the evidence of the contract—the policy—was delivered, and before the sickness and death of insured, it is immaterial what was said and done by the insured’s stenographer at or before the time of the delivery of the policy and the payment of the premium. Nothing she said or did could affect the validity or binding force of the previously completed contract, if one existed. The question of fact whether there was a completed and binding contract for insurance prior to the delivery of the policy and the payment of the premium, was submitted to the jury upon voluminous and conflicting testimony, under instructions which are not subject to any just exceptions. The jury found there was such a contract. This verdict of the jury is overthrown by the court on the strength of presumptions which are unknown to the law. There is no presumption of law that all contracts for insurance are in writing. \* \* \* If the policy was not delivered, and the premium was not paid, before the sickness or death of the insured, these facts would not preclude the plaintiffs from showing, as they did, to the sat-



isfaction of the jury, that there was a valid verbal contract for the insurance, and that time was given for the payment of the premium; and, as the insurance might lawfully have been effected in this way, there is no presumption of law that it was not so done. *Lisbon vs. Lyman*, 49 N. H. 553. To hold otherwise is to confound the distinction between facts and circumstances and presumptions." 83 Fed. 643.

We have no fault to find with the statement that "fraud vitiates all contracts," but we must respectfully and earnestly insist that before it can be availed of, it, first, must have been plead, secondly, to have been proven, and that it must, thirdly, be real fraud and not the imagination of counsel.

The defendant in error is not without authority for the contention made and she may declare herself fortunate to be able to turn to the case of

*Ins. Co. vs. Higginbotham*, 95 U. S. 380.

This case is directly in point with the case at bar and the arguments stated in the opinion of Mr. Justice Hunt, with the mere changing of names, might well stand as the opinion of this court in the case at bar and also furnishes an unanswerable argument to the endeavor of the plaintiff in error to seek to try the case upon issues not made and to inject into the case and into the contract of the parties, statements upon which they never agreed. Let us attract the court to the contention of the parties in the case of *Insurance Co. vs. Higginbotham*, *supra*. The Court said:

"The chief subject of contention arises upon the refusal of the judge to charge as requested by the defendant in the following prayers:

1. If the jury find from the evidence that the certificate of health in evidence was made by Dr. Day, the insured, on or about the 1st of October, 1870, and by him delivered to the agent of the defendant, at Washington City, and by such agent sent to the principal office of the defendant, at Newark, N. J., and that the receipt in evidence, dated July 16, 1870, was thereupon forwarded from the main office of the defendant, to its agent at Washington City, and by him delivered to the insured on or about the fourteenth day of October, 1870, and that between the time when said certificate was made and the time of the delivery of said receipt to the insured, Dr. Day had had any derangement of health, and did not disclose that fact to the agent of the defendant when the receipt was handed to him by the agent, or before, they will render a verdict for the defendant upon the sixth plea.

2. On refusing to instruct the jury as prayed by defendant, as follows: If the jury find from the evidence that when the certificate in evidence, dated October 1, 1870, was given to the agent of the defendant at Washington City, the latter was not authorized to and did not assume to reinstate the policy in suit, but accepted the premium and forwarded the certificate to his principal, and that the receipt in evidence, dated July 16, 1870, was then in the home office of the defendant, in New Jersey, and that said receipt was forwarded to the agent of the defendant on or about the twelfth day of October, 1870, and by him delivered to the insured on or about the fourteenth day of the same month; and if the jury further find, that, after the date of said certificate, and before the delivery of said receipt to the insured, the insured had had any derangement of health, or that at the time of the delivery of said receipt to

him he was not in sound health—they would render a verdict for the defendant.

The state of Dr. Day's health during the summer and autumn of 1870 was the subject of contradictory testimony. The defendant gave evidence tending to prove that he was compelled by ill-health to give up his business as a teacher on the eighteenth day of October, 1870; that for several weeks prior to that time he was much debilitated, and was conscious of that fact; that in November he had the consumption, of which he died in January following; and that he was in feeble and disordered health from the spring of 1869 until his death. The plaintiff, on the other hand, gave evidence tending to show that he was in sound health till the latter part of October, 1870, and that he did not have the consumption until the month of November, 1870.

The exceptions we are to consider assume that on the first day of October, 1870, when he presented his certificate of health to the agent at Washington, Dr. Day was in a condition of health that made him a satisfactory subject for the reinstatement or continuance of his policy of insurance.

It is contended that between the time of thus making and presenting his certificate to the agent and the date (fourteen days later) on which the agent delivered to him the receipt by which his insurance policy was continued in force until July 16, 1871, there had been a change in his health which would have caused the rejection of his application to continue the policy had such change been made known to the company, and that the failure to make known such change was a fraud, which invalidated the policy thus renewed or continued.

It is not contended that there were any false representations made on the 14th of October, or any devices or contrivances to deceive the

company. No affirmative action on that occasion is complained of. The contention is that the representation made on the 14th of October was a continuing one, from the time it was made till the delivery of the renewal receipt on the 14th, and that, if not true at the latter date, the contract was avoided.

In reaching a conclusion on this point, we may notice, 1st, that no inquiry was made of Day or demand for information as to his condition between the 1st and the 14th of October. The company was particular and specific in its inquiries as to his condition on the 1st of the month, and required prescribed forms of evidence as to that condition. There it stopped, and neither by expression nor by implication intimated a desire for later information.

It is to be observed, secondly, that the issuance made to him on the 14th day of October relates back to the 16th of July, in the same year. The certificate reads: "Policy No. 59,687, on the life of Richard H. B. Day, is hereby continued in force for one year from date, July 16, 1870, settlement of the premium having been made as per margin." The settlement in the margin showed the payment of \$137.50, being the amount of the premium of insurance for one year on the sum of \$5,000, as stated in the original policy of insurance.

It will be observed, thirdly, that the distance between Washington and Newark is about two hundred miles only, and that the certificates of Dr. Day's health and the application which were forwarded by the agent to the company at Newark would, in the ordinary course of the mails, reach the office at Newark on the morning or during the day of the 2d; that all the forms of the company to authorize a renewal were complied with, and that the risk was such as the company would accept as a desirable one,



and that the receipt for the renewal was received in Washington on or about the 14th of October, and was on that day delivered to Dr. Day.

The prayer of the insurance company did not include a request that the jury should determine as a matter of fact whether, upon the evidence submitted, the representation was or was not a continuous one, whether the contract was consummated on the 14th of October, or by relation on the 1st of October; but the judge was requested to charge, as a matter of law, that the representation was a continuing one.

The facts referred to, we think, show that, although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the 1st of that month. The money was paid to the agent at Washington on that day. The insurance was post-dated so as to include that day. The full amount of the premium for one year was paid by the applicant, viz., \$137.50. The company cut off the insured from two and a half months of his policy when they issued it on the 1st of October, and dated it as of July 16, although taking payment of the premium for a year. *We think that they did not necessarily intend to cut off an additional fourteen days, but may have meant it to be as of the date when the insured paid his money and presented a risk that they were willing to take, and of the time that it would have taken effect if they had responded without a delay of two weeks. Had it been otherwise, we cannot conceive how the sagacious business men who control this company would have assented to the delivery of the policy without inquiry as to the intermediate time.* More than three months elapsed before Day's death, monthly returns being made by the agent; and the company must have known and assented to the delivery of the



renewal receipt not only, but to the fact that there had been no inquiry or information as to Day's health after October 1st. The jury might account for it on the theory that the whole contract was intended to be and was as of October 1st, and that it spoke from that date.

There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. The company made inquiries to its own satisfaction, so far, in such direction, upon such points, and within such periods, as it thought proper. It was not for him to advise the company of what it should do, or to volunteer information which it did not seek. He paid his money, delivered his certificate, received the renewal when the company chose to give it, found upon examination that it covered the whole period from the July preceding. He lived in the same town with the agent, and received no suggestion from him that anything further was expected, and was warranted in assuming that his contract was intended to take effect from an earlier period than its actual delivery. He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise."

It will thus be seen that by the charges to the jury requested by the insurance company, they sought to submit the question as to the effect of the assured's change of health between the first day of October and the 14th day of October. Here they seek to question the effect of the assured's health between March 16, 1911, and April 6, 1911, the dates being respectively the dates of the application and the payment of premium, and the reception of the policy.

The Court very potently remarks:

“In reaching a conclusion on this point (meaning the contention that the representation was a continuing one) we may notice, first, that no inquiry was made of Day or demand for information as to his condition between the 1st and 14th day of October. The company was particular and specific in its inquiry as to his condition on the first of the month and required prescribed forms of evidence as to that condition, and there stopped and neither by expression nor by investigation intimated a desire for later information.”

When the Insurance Company in the case at bar agreed that if a policy should be delivered, it should become effective March 16th, they did not necessarily intend to cut off the additional 21 days between the date of the application and the delivery of the policy. They are not concerned with any other feature except that the insured should pay his money and present a risk that they are willing to take. In the case at bar it is not contended that there were any false representations made on the day the policy was delivered, nor any device or contrivances to deceive the company. No affirmative action on that occasion is complained of, the contention being that the representation made on March 16th was a continuing one from the time it was made until the delivery of the policy. Let us answer this contention by using the words of the Supreme Court of the United States. At page 386, volume 95, the Court said:

“We are of the opinion that the exceptions to the charge of the judge, upon the theory that the representations by Dr. Day were made on the fourteenth day of October, or that concealment was then practiced by him, on the ground that the previous representations, necessarily and as a matter of law, were continuous, and

that the contract was consummated on that day,  
*cannot be sustained."*

In the instanced case, counsel for the insurance company presented an issue in their pleadings and requested a charge from the court and the Supreme Court held against them. Here, in the case at bar, the plaintiff in error, without an issue in the pleadings and without a request made to the judge for a ruling in their favor, after speculating upon the results of a trial upon other and different allegations, after a verdict has come in against them, for the first time making a contention which, if made in the due and orderly course of procedure, would have been resolved against them, upon the authority of the opinion of the Supreme Court of the United States in the case last referred to.

It is amusing, to say the least, to think of an insurance company and its counsel, learned in the law as we are glad to admit they are, shall, as a last resort, ask this court to overrule the Supreme Court of the United States upon a question that is not within the issue, not within the evidence, and last of all, not supported by law. Their quotation from the "Office Boy Digest" at page 25 of their brief, brings the suggestion that the office boy may have written the brief. "If one buys bread, he does not expect a stone. If he bargains for fish, he is not satisfied with a serpent," is quoted for some purpose in the brief of plaintiff in error. The application of the remark seems more justifiable when we say that the assured in this case, when he made his application to the insurance company upon a form submitted by them which they evinced a willingness to accept and answer their questions fully and truly, submitted to a medical examination and paid them his money, sought "to buy bread"

for his widow and baby, they now find that the insurance company endeavored to give him "a stone." "He bargained for fish," expecting that the insurance policy would furnish an estate that he could pass over to his loved ones, his wife and baby, and on their behalf, by this brief, we serve notice upon them that they shall not be "satisfied with a serpent." "What man is there of you, whom if his son ask for bread, will he give him a stone? Or if he ask for fish, will he give him a serpent?"

Thus the man spoke who has never been equaled in a knowledge of abstract and evenhanded justice.

The corruption of the remark forcibly reminds us of the attempt of the Insurance Company, in this action, to pervert the contract, add to it for the sole purpose of avoiding a liability voluntarily assumed as a part of their plan of soliciting business.

They must keep their contract. They cannot insure us effective one date and then, when illness comes, which may or may not have resulted in death, claim another and different date as the beginning of the insurance. We are not disposed to make capital out of the fact that the plaintiff in error is an insurance company with a capital of four million dollars and that defendant in error is a widow with a dower interest in four hundred acres of land as counsel seem to fear in their suggestion at page 38 of their brief. We notice "the false contention that a poor widow is here fighting a great mutual insurance company," and again at page 40, "the rules of law which are invoked are not arbitrary or vicious rules used to suppress the weak or aid the strong. Besides, the plaintiff in this case cannot be classified as among the weak because she admitted on cross examination, over the objection of counsel, that she had inherited from her first husband,



420 acres of land," and this interest was only a dower interest. "We refer to this testimony, only for the purpose of meeting the contention which will be advanced that the rules of law sought to be invoked for the protection of the plaintiff in error, should not be invoked where a poor unfortunate widow is fighting a great mutual life insurance company. Such considerations are, of course, immaterial except as hollow arguments used to produce possible prejudice."

The great insurance company, plaintiff in error, seems to have some conscientious misgivings as to the justice of their cause and seems to fear that this court might perhaps, unless they mentioned it, presume to favor the widows and orphans, and might be disposed to give them some protection against the effort of the insurance company to deny liability in this case and pervert the just rules of law which experience and time have fixed for the control and orderly transaction of business in court.

We make bold to say that the laws under which we claim and the decisions which we have cited to sustain it, are made for the protection of widows and orphans against machinations of a litigant that is seeking, without right, to defeat a liability which its voluntary contracts imposed upon it. The argument of the plaintiff in error and the circumstances on which it seeks to base a defense are so notoriously and exceptionally absurd as to find no support in precedent. It is a case where a defense is attempted to be made without a pleading upon which to base its claim, without a contract creating the duty, without an inquiry being made concerning good health; but with a contract containing two conditions (a) payment of premium, and (b) delivery during life time, and these two conditions indisputably performed and proven. If such a con-



tract does not present the attributes of validity, if the defendant in error cannot recover upon the policy of insurance in this case, under these facts, then it follows that "to insure" means "not to insure." To lead the deceased to believe that he was providing an estate for his wife and baby, and then, when the inevitable time shall have come, when death removes him from the sphere of life, and the aching loneliness of widowhood becomes a stern reality, to find the insurance company trying to read language into the contract that was never contemplated by the parties, is to merit the adverse judgment of a jury of honest men, and a peremptory denial of the sophistry, fallacy and absurdity of the argument offered in defense of their contention. If it were agreed that the policy should not be effective unless delivered during lifetime, good health and insurable condition, *it would have been nominated in the bond.*

Using the language of a learned justice, "Ever since the celebrated case of Shylock vs. Antonio, reported at large by Wm. Shakespeare, down to the last decision of the Supreme Court of the United States, forfeitures and exemptions from liability have been unfavored in the law, and contracts construed strictly against the person claiming the exemption, and liberally in favor of the other parties. So, therefore, contracts of insurance will be liberally construed in favor of the insured and strictly construed against the insurer, and generally all ambiguities limiting or avoiding liability under the contract will be resolved against the insurer.

McMaster vs. New York Life Ins. Co., 78  
Fed. 33.

Insurance companies are eager to take the money of the assured, but if death comes a little more quickly than the sagacious gentlemen sitting in New York juggling the funds of its policy holders think it ought to come, litigation may be expected and the courts called upon to stay the hand of the oppressor, to stand between the beneficiary and the company. The liberality of construction, the favor shown the insured and his widow and orphan, is a substantial favor justified by the decisions, and does not rest upon sentiment.

In the case at bar, the parties expressly agreed that the insurance should take effect March 16, 1911, and that the premium should become due and payable on the anniversary thereafter. They are now contending that the insurance was not effective on that date. Let us suppose that Mr. Moats had lived until some time between March 16, 1912, and April 6, 1912, and at which time he died, and suppose also that he had not paid the second premium, to what date, may we ask, did the first premium extend? Did it pay for insurance one year hence from March 16, 1911, the parties having agreed that to be the anniversary date, or did it pay for insurance one year hence from April 6, 1911? We venture to assert that if Mr. Maots had died between March 16, 1912, and April 6, 1912, without having paid another premium, that the same litigation would have resulted upon the policy, and that the company would now be found asserting that the liability began as of March 16, 1911, whereas, in the case at bar, they are contending that liability began April 6, 1911, and that a delivery of the policy was necessary to the completion of the contract. We may assert with certainty that such would have been the condition, for we have a judicial record of its action in the case of

McMaster vs. New York Life Ins. Co., 78 Fed.  
33.

The plaintiff in this case had such an experience. The policy was made effective on the date of the application but without an agreement to that effect and when the assured died, as McMaster did die, between the date of application and delivery one year hence, the plaintiff in error in that case boldly came into court and asserted that the policy was effective from the date of the application and the year expired March 16, 1912, and but for the intervention of the conscience of the court in a suit to reform the policy, this selfsame plaintiff in error would have defeated the widow of Frank E. McMaster out of the funds which the wisdom and forethought of the plaintiff's intestate made possible.

Let us not hear any more from the plaintiff in error in this case of a contention so absurd. Let us construe the contract made by the parties liberally and with a desire to sustain the claim and take the course mapped out by the Supreme Court of the United States in the case of Insurance Company vs. Higginbotham, 95 U. S. 380, and hold that representations made in an application for insurance are sufficient if true when made, and that "had it been otherwise, we cannot conceive the sagacious business men who control this company would have assented to the delivery of the policy without inquiry as to the intermediate time." (95 U. S. 385.)

For other cases holding that statements in the application refer to the date when they are made, see the following:

Richards vs. Manhattan Ins. Co., 31 Mo. 518.

Levie vs. Metropolitan Ins. Co., 163 Mass. 117.

Mutual Life Ins. Co. vs. Schultz, 73 Ill. 586.

John Hancock Mutual Life Ins. Co. vs. Daley,  
65 Ind. 6.

This is true whether the statements made in the application are regarded as warranties or as material representations.

Decamp vs. N. J. Mutual Life Ins. Co., 7 Fed.  
Cases 313.

Gordon vs. U. S. Casualty Co., 54 S. W. 98.

Grier vs. Mutual Life Ins. Co. supra.

Ins. Co. vs. Higginbotham, supra.

And it has always been held that in the absence of inquiry, a failure to disclose certain facts as to the health of applicant is not fraudulent.

Spitz vs. Mutual Benefit Life Ins. Assn., 25 N.  
Y. Supp. 469.

Mobile Life Ins. Co. vs. Walker, 58 Ala. 290.

3 Cooley Briefs on Ins. 2102.

IT WAS A DISPUTED QUESTION OF FACT AS TO WHETHER OR NOT THE REPRESENTATIONS MADE IN THE APPLICATION FOR INSURANCE WERE TRUE OR FALSE.



The foregoing proposition applies to the contention of plaintiff in error as stated in their first specification. The lower court who presided at the trial and heard the testimony, in passing upon the motion for a judgment not obstante veridecto, used the following language:

(Transcript, page 50) "The motion was overruled on the first point for the reason that the evidence was conflicting and presented a question for the jury."

Inasmuch as this court will desire to re-examine the question, it is deemed necessary to an intelligent consideration of it that we refer to the testimony somewhat more extensively than has been done by the plaintiff in error. A careful reading of their brief discloses accuracy and completeness in the statement of the testimony tending to support their theory of the case, but when referring to any testimony opposing their contention, their statement of the same, while substantially accurate as far as it goes, is manifestly incomplete. We shall attempt to supply this insufficiency.

We, therefore, say to the court that the evidence in the case was conflicting upon the question of whether or not the representations made in the application were false, and we contend *that the weight of the evidence was in favor of the defendant in error.*

A careful statement of the testimony will be undertaken to the end that we may demonstrate to the court, not only that the evidence was conflicting, but that the preponderance was greatly in favor of the defendant in error.

H. L. UNDERWOOD, a witness called on behalf of the insurance company, testified as follows: (Transcript, pages 80, 93, 94.)



“Q. Did you examine the patient yourself?

A. I did.

Q. The applicant, I should say. Tell the jury what you found him to be from a physical view-point?

A. What is the question? (Question read.) I found nothing abnormal. I found him a good risk, as far as the examination revealed his condition.

The witness then went ahead and stated with what detail he made the examination and the particularity of it, saying in substance that the assured's heart and lungs were sound. Urinalysis disclosed nothing abnormal, abdominal organs sound, pulse normal and also asked this question: (Transcript, page 96).

Q. He had no ailment there at the time?

A. None that I detected.

Q. And you were there looking to find whether or not there was anything, were you, as the representative of the defendant company?

A. I was.”

It will thus be seen that one of the company's agents whose sole and only duty was to conduct the medical examination, to ascertain the condition of the assured, did so, and after a very thorough examination, pronounced Mr. Moats a good risk.

DR. NICHOLAS MOLITER was called by the defendant for the purpose of showing other consultations with physicians than the one mentioned in the application. An examination of the testimony of Dr. Moliter shows this attempt to have failed. Question by Mr. Montgomery: (Page 97 of the Transcript.)

“Q. Did Mr. Moats during the year 1911

consult you with reference to any physical ailments?

A. He was up in my office, accompanied by his wife, early in March."

The Court will observe that the doctor does not testify that Mr. Moats consulted him, but that he was in his office accompanied by his wife.

"Q. Concerning what ailment, if any, did Mr. Moats consult with you on March 3rd, 1911? (Transcript, 98).

A. He and Mrs. Moats came to the office on March 3rd, *Mrs. Moats came to consult me, and about that time I had a conversation also with Mr. Moats.*"

The Doctor had a very faint recollection of the conversation that Mr. Moats complained of restlessness and at times weakness, but at no time did this witness testify that Mr. Moats consulted him for a serious or other ailment. Upon cross-examination, the witness testified: (Transcript, page 102.)

"Q. Now then, the real consultation that day took place for Mrs. Moats?

A. I believe that was the consultation that was paid for.

Q. The other was only incidental?

A. The other was only incidental, I believe that is a fact.

Q. And was not for a serious disorder, or anything like that, was it?

A. No, I didn't go into the case with him.

Q. And Mr. Moats was working very hard down there and you advised him to take a rest?

A. Yes, sir.

Q. Now then, from that view point, looking at it from that time, from the condition that Mr. Moats was in, could you tell that the man was going to die within ninety days?

A. I gave no thorough examination—couldn't give an opinion on that whatever—wouldn't attempt to.

Q. (Transcript, page 104). Now, confining to Mr. Moats, there was no reference to organic diseases at all?

A. I made no thorough examination, and could not pass an opinion on it—would not attempt to.

Q. (Page 105.) The real consultation was for Mrs. Moats?

A. As I recall.

The Court will observe from this testimony that it has no tendency whatever to prove the falsity of the statements in Mr. Moats' application, for, as has been said by this Court in the case of

Mutual Reserve Life Ins. Co. of New York  
vs. Dobler, 137 Fed. Rep. 550, at page  
556,

“It is plain that by these questions the plaintiff in error sought to ascertain whether the applicant had consulted a physician for any disease or ailment or had been attended or prescribed for by a physician for a disease or ailment. In *Moulor vs. Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447, it was said that the application for insurance must be understood to relate to matters which have a sensible, appre-

cialable form. In *Connecticut Mut. Life Ins. Co. vs. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708, it was said that the questions in an application do not require the applicant to tell every incident or accidental or slight disease or ailment which left no trace of injury to health, and were unattended by substantial injury or inconvenience or prolonged suffering; and in *Hubbard vs. Mutual Reserve Fund Life Assn.*, 100 Fed. 719, 40 C. C. A. 665, it was held that the word "consulted," found in such questions, did not relate to the opinion of a physician concerning a slight and temporary indisposition, speedily forgotten. Of similar import are the decisions of the Supreme Court of Michigan in *Plumb vs. Penn. Mut. Life Ins. Co.*, 65 N. W. 611, and the Supreme Court of Vermont in *Billings vs. Metropolitan Life Ins. Co.* (Vt.), 41 Atl. 516, and other decisions too numerous to require further specification."

Let us turn to the testimony of Mrs. Moats (Transcript, page 385):

Q. Do you remember of an event of your being in La Grande upon the occasion of seeing Doctor Molitor?

A. Yes.

Q. Do you remember about when that was?

Q. I don't just remember the date, but it was in the spring. I went to see him to consult him myself, and Mr. Moats was with me at the time.

Q. State whether or not Mr. Moats went to see Dr. Molitor to consult him for himself?

A. I do not know; not when I was with him, he didn't.

Q. State whether or not he did when you were with him?

A. He didn't that day I was with him. He went with me because I hadn't been very well. I was just getting over a severe illness, and he went with me, and my talk was with Dr. Moliter myself."

It will thus be seen from the incident with Dr. Moliter that there was no consultation with him at all. A casual remark called for the Doctor's advice to take a rest, and to take the Doctor's statement for it: (Transcript, page 103.)

"Q. And was not for a serious disorder, or anything like that, was it?

A. No, I didn't go into the case with him."

Again the plaintiff in error sought to prove the allegations of their answer by offering a witness by the name of CHARLES HENRY UPTON. (Transcript, 267.) This witness thinks that he met Mr. Moats some time during the spring of 1911. Whereupon Mr. Montgomery asked the witness the following questions: (Page 268.)

"Q. What statements, if any, did Mr. Moats make to you at that time concerning his condition?

A. I don't recall any outside of his explaining that he was unable to sleep and more or less nervous.

Q. What, doctor, was your diagnosis of his case?

A. I considered it a case of neurasthenia.

Q. Explain to the jury, doctor, what that is.

A. That is nervous exhaustion, nervous depravity, overworked nerves, considering the recuperative power of the nervous system.



Q. And did your examination disclose any physical reason as a cause of this nervous condition?

A. Physically sound, apparently."

Upon cross-examination, the doctor said: (Page 270.)

Q. You are quite unable to say, doctor, just when it was that Mr. Moats came in to see you?

A. No, I couldn't give you the date.

Q. You don't know whether before or after the 16th of March?

A. I could not be real positive about it.

. . . . .

Q. Mrs. Moats was with him?

A. Yes, sir.

Q. Was that the time that you removed the growth from his eye?

A. He may have been there before. I hadn't remembered that I had removed something from his eye, but probably I did.

Q. You don't remember that?

A. I don't think I did at that time.

Q. I mean the eye-lid.

A. I understand. I don't think I did at that time.

Q. (Transcript, 272). Did you examine him physically?

A. Yes, sir, went over his abdomen and his general condition—found him to be in good condition.

Q. Found him physically sound in that respect?

A. Apparently.

Q. Found no organic lesions?

A. No organic trouble; no show of pathological condition.

Q. No pathological condition?

A. Not that I could determine.

Q. (Transcript, 273.) Now, neurasthenia is a general name which physicians have to designate a multitude of things, isn't it?

A. Not a multitude of conditions, no, sir. It designates just exactly what the name says, an asthenic condition of the nervous system.

Q. What does that mean?

A. That means without sufficient nourishment to keep it up to normal conditions.

Q. In other words, it might be due to over-work?

A. It might be due to over-work, exhaustion, depravity in any manner.

Q. *Not necessarily serious in any respect?*

A. *May not be.*

Q. If a man is following a sedentary life, working on the inside, and does not take much exercise, he may get that?

A. More apt to have it.

Q. A man out on the farm, he may get it by working hard on his farm, and keeping long hours?

A. Worrying, yes.

Q. Worrying, incident to the business?

A. Yes, sir.

Q. None of it is necesasrily serious?

A. Might not be, not necessarily. That is right.

The witness then testified that the condition in which Mr. Moats was, requiring his confinement in the asylum, did not necessarily begin prior to March 16th, the witness saying: (Transcript, 275.)

“Q. If a man was—later developed a mental condition which required him to be confined in the asylum, isn’t it possible that such condition might spring up after the 16th of March?

A. Oh yes, yes, mania can occur in a very short time; may become a raving maniac inside of 24 hours, without any previous lesion noticeable.”

Then the doctor said: (Transcript, page 277.)

Q. Now, doctor, suppose that Mr. Moats was examined on the 16th of March, 1911, and at that time was found to be sound both physically and mentally, as far as one could discover upon a thorough examination, and afterwards he went to Portland, was there treated at a hospital, and later on in April was taken to the asylum, was taken to the asylum on the 18th of April, and was discharged as cured on the second of May, and again committed to the asylum on the 7th of June, and died on the 14th of June of maniacal exhaustion, is it not possible under that state of facts for the maniacal condition to have begun, developed, and culminated subsequent to March 16, 1911?

A. Yes, sir.”

Now, let us turn to the testimony of *Mrs. Moats* and ascertain what the conflict was between the testimony of this witness and Mrs. Moats. (Transcript, page 387.)

“Q. Did you hear some testimony by a gentleman by the name of C. H. Upton yesterday?

A. I did.

A. Are you acquainted with Dr. Upton?

A. I am.

Q. You may state whether or not Mr. Moats, together with yourself, called upon Dr. Upton.

A. Yes.

Q. Do you know when it was?

A. It was—well, the very day that I went to consult Dr. Molitor about myself, we came directly from his office. We had heard that Dr. Upton was an eye specialist, and Mr. Moats had been having trouble with one of his eyes for about a week or two, and we came directly from Dr. Molitor's office to Dr. Upton's. That was the only time—the first trip and the last.

Q. What was the trouble with his eye?

A. Just a swelling underneath here. It didn't pain him, but he was anxious to find out what it was. I was present when the doctor examined his eye.”

The witness then testified that the affection was of no importance, caused no difficulty, and upon being removed by the doctor, returned no more, and then said: (Transcript, page 388.)

“Q. State to the jury whether or not your husband there at the time consulted Dr. Upton for nervousness or sleeplessness?

A. *There wasn't a thing mentioned about sleeplessness, about my husband's condition. The only thing that he done was taking that lit-*

*the lump, as he called it, off of his eye, and giving him this iodine, and he never examined him or spoke of nervousness—nothing else mentioned but that.*

Q. Tell the jury whether or not there was a discussion had on insurance?

A. There wasn't such a thing as insurance mentioned—not a thing of insurance mentioned. We did talk on eye subjects—his eye.

Q. State whether or not you inquired of Dr. Upton whether or not your husband was an insurable risk?

A. No, I didn't. I had no desire to ask any such a question. I never thought of it. There wasn't a thing about insurance mentioned while he was in the office."

The next witness produced by the plaintiff in error was a witness by the name of JAMES W. LOUGHLIN. It was Dr. Loughlin who testified that Mr. Moats consulted him on the morning of March 16, 1911. If this witness had not made a mistake in the date when he first saw Mr. Moats, this litigation perhaps would not have happened, but when we consider the doctor's testimony, beginning at page 259 of the record, in the light of the cross-examination, we find that Mr. Moats, if he did consult him, it was not for a serious disorder, but for a slight affection that would speedily disappear.

"Q. (Transcript, 267.) And from Mr. Moats' viewpoint it had the appearance to him after he had been encouraged by you to the belief that it was a slight disorder, that it would speedily disappear?

A. I encouraged him in that belief?

Q. He went away with that belief?



A. He went away with that belief."

Mrs. Moats takes issue with Dr. Loughlin as to the date of his consultation. She testifies that during March, 1911, her husband managed the farm. (Transcript, page 390.) This question was asked her:

"Q. You may state whether or not there was anything of a peculiar nature in his conduct, noticed by you, or observed by you previous to March 16, 1911.

A. None whatever. I never noticed anything peculiar, and I was with him constantly. Nothing at all that I could notice, anything strange at all about him. He was just as natural to me as he ever was. I never noticed anything.

Q. State whether or not he became at any time unduly excited from any cause?

A. No, he never."

The witness then testified (Transcript, page 392) that she and her husband went to La Grande on or about the 16th of March. Went in a buggy. The team was a work horse and another one, and the roads were very bad. The team had been running out in the straw. The bad roads made it hard pulling. Started to La Grande between eight and nine o'clock, and on account of the roads, drove very slowly. Arrived in La Grande between ten and eleven, because it was not very long before lunch time. (Transcript, 393). Upon arrival at La Grande, the first thing after we left the team at a livery stable, we went to N. K. West, a dry goods store, and bought a pair of shoes. Mr. Moats selected them. Then went to Mr. Miller's office, the real estate man, an old acquaintance, to see Mr. Lewis about life insurance. Mr. Moats phoned for Mr.

Lewis (Transcript, page 394). Could not get him and waited a while thinking perhaps he would come down. Went to the restaurant for dinner (Transcript, 395). After dinner went back to Mr. Miller's office, waited there until Mr. Lewis came; talked insurance (Transcript, 396); then him (meaning Mr. Moats) and Mr. Lewis made out a contract and took out a policy. Then Mr. Moats went to Dr. Underwood's. After the medical examination (Transcript, 396 and 397) husband and wife met, ate some ice cream, and started home.

“Q. (Transcript, 397.) Did you see Dr. Loughlin on that day?

A. No.

Q. (Transcript, 399.) When did you see Dr. Loughlin?

A. I never saw Dr. Loughlin until after that day.

Q. And just when was it please?

A. Well, it was one day some time after that. I don't just remember how long, but it was the same time that my husband—when I was with him, went to see him up at his office.

COURT: About how many days?

A. Well, I couldn't just enumerate them, but it was some time after that, for we did not go back to La Grande for several days after that.

Doctors Molitor, Upton and Loughlin are the only physicians who claim to have seen Moats personally, prior to March 16th, and it will be seen from the testimony that Dr. Molitor's statement was not a consultation at all.

Dr. Upton did not know when his talk took place,

and as a matter of fact, was not consulted for anything else than a slight affection upon the eyelid, which was removed with such ease as to involve nothing constitutional, functional, or serious.

Dr. Loughlin's consultation occurred after March 16th. The learned doctor, being mistaken as to his date.

The next class of witnesses offered by the plaintiff in error were those whose opinion upon the hypothetical state of facts was obtained, and who saw Mr. Moats some time after the date of his application. These witnesses were Doctors Williamson and Tamosie, and a nurse by the name of Baldwin.

Dr. Williamson discoursed interestingly upon the subject of insanity, but added little that was available in determining whether or not Mr. Moats was an insurable risk. The actual facts of the case were put up to the doctor in a hypothetical question appearing at page 294 of the transcript of the record. That question is as follows:

“Q. Assuming Doctor, that a person on the 3rd of March was in a doctor's office, and his wife was consulting a doctor for some nervous trouble, and in a casual way he should say to the doctor—inquiring how he was, and without any examination the doctor would say, ‘well, I advise you to take a rest,’ and on the 16th of the month, the same month he would consult a physician for sleeplessness, in which there was no pain connected with it—no inflammation or no appearance of physical unsoundness—and was examined that same date, and his heart was found to be normal, the circulation regular and normal, his lungs sound, his abdomen and the organs contained therein sound, and an analysis of his urine showed it to be sound—

to be normal—and that on the 21st of the month he went to a sanitarium and there was treated for nervousness and sleeplessness, and was later confined in the asylum, and was there for a few days and was discharged as being cured, and later returned to the asylum, and after four or five days died of exhaustion due to maniacal depressive insanity, what, in your opinion—you may state whether or not in your opinion the cause of that insanity could have happened after March 16th.

A. Yes, it could have happened after March 16th, in the conditions you have described."

This, likewise, was the opinion of Dr. Upton. See transcript pages 277, 278.

Dr. Tamosie was the only physician who did not show a spirit of fairness, and who seemed to desire to serve his master more arbitrarily even to the extent of departing from the spirit of fairness and element of disinterestedness. The contradiction of the learned doctor was so complete that his testimony was without value when submitted to a disinterested jury.

George Baldwin (Transcript, p. 235) a witness on behalf of the defendant, claimed to be a nurse at the Mountainview Sanitarium. He sought to give a description of Mr. Moats, and to quote what he said. This witness was a layman who had worked a few months as a nurse with patients afflicted with mental diseases. He remembers (Transcript, p. 241) that Mr. Moats was a very perfect specimen of physical manhood, and that Mr. Moats' statements are the only statements of patients he remembers out of eight or ten men. (Transcript, pp. 243, 244.)

*The next witness called by the plaintiff in error, was Dr. George W. Zimmerman.*



Dr. Zimmerman was an Osteopathic physician (Transcript, 246). He claims to have seen Mr. Moats on the 18th day of March, at which time he advised him to try Osteopathical treatments. This witness gives it as his opinion that the condition he found Mr. Moats in, was a condition of growth, lasting over a considerable period of time. The value of this opinion is quite apparent, when the doctor was asked this question (Trans. p. 253):

“Q. You observed him for a certain length of time, did you?

A. I observed him for probably thirty minutes.”

It was a wonderful example of wisdom! observing a man for thirty minutes and he could see great contractions of the muscles of his back, when no other person could possibly see them (Trans. 254, 256) and then make the extravagant statement appearing at page 257:

“Did you give him any warning as to his conditions?

A. I believe I made the statement that he must have help, whether he got it from me or wherever he got it. If not, there were just three endings to his condition, two endings to his condition, and one of them was to become insane and the other one was to die.”

On cross-examination this witness was able to explain why he knew that there were two endings to Mr. Moats's condition.

“Q. Did you say that in the presence of Mrs. Moats? (Trans., p. 257.)

A. I did.



Q. When? Before or after?

A. When he was through the treatment; when he was through his examination.

Q. That was to encourage him to get help, was it?

A. From some place, yes, sir.

Q. Now, you take the position, do you take the position that because Mr. Moats was a little nervous, said that he couldn't sleep, that you could, by feeling his back and the muscles of his neck, determine to a certainty that the man was either going to die or go insane?"

The witness "ducked," dodged, and then answered:

"A. I can't make an answer to your question without that."

(Meaning some hearsay notions that some vagabond had told him.)

Q. Now, you knew as a matter of fact that he was going to die, didn't you?

A. No, sir, unless that he would die some time; yes, it is true.

Q. You weren't able to fix a date exactly, were you?

A. No, sir; no, sir.

Q. And the question of his insanity was the uncertain part?

A. Yes sir.

Q. And you wouldn't presume to fix the date, and didn't fix the date?

A. No, sir.

Q. You knew, as a medical man, that if he

lived long enough, he would eventually get Senile Dementia, didn't you?

A. Not necessarily.

Q. That would be the tendency, wouldn't it?

A. We have people who die that are not insane—do not have Senile Insanity.

Q. That is a very prevalent disease in very old people, isn't it?

A. Well, it is when they get extremely old, yes."

By reference to the testimony of Mrs. Moats, we were able to show to the jury what the true facts were. (See Trans. p. 400.)

*Mrs. Moats said:*

"Q. Are you acquainted with G. W. Zimmerman, an osteopath?

A. I never met him but one time.

Q. When was that?

A. That was the time—I don't remember the date of that, but it was one time I was up there with him—with my husband.

Q. State whether or not it was after the time your husband was examined by Dr. Underwood for life insurance.

A. He wasn't examined by Dr. Zimmerman for life insurance.

Q. No, I said after the time he was examined by Dr. Underwood for life insurance.

A. Oh, well, it was some time after that—some time after that.

Q. Were you present at the time he was examined?

A. I was.

Q. Tell the jury whether or not Dr. Zimmerman had him take off his shirts and disclose his naked back?

A. No, the only thing he requested him to do was to remove his coat and vest, and his top shirt—that was all.

Q. What did the doctor do with him?

A. He just simply put him on the table, and rubbed his back a little bit.

Q. What complaint, if any, did your husband make?

A. He never made any complaint.

Q. State whether or not he complained of the muscles of the neck hurting him?

A. He never complained at all—never complained of anything.

Q. What was his conduct, as to whether or not he was restless?

A. He wasn't restless on the table. He laid perfectly quiet.

Q. How long was the doctor examining him?

A. He couldn't have been at the office more than half an hour, because it was almost five o'clock—getting late, almost supper time. He wasn't but a few minutes. I didn't think he made much of an examination at all, and I was present all the time.

Q. What was the doctor doing mostly?

A. He was talking on a conversation that wasn't my husband by any means.

Q. Talking about his other business, about how busy he was?

A. Talking about other patients that he had.

Q. Now, had you seen your husband's back, that is, his naked back, during—at or about that time?

A. Yes.

Q. Tell the jury whether or not the muscles of his entire back were contracted in any way?

A. I didn't see anything wrong with his back—not anything. He was simply perfect—nothing wrong with his back. He never complained of anything being wrong with his back.

Q. State whether or not he told Dr. Zimmerman that he was very nervous and could not sleep?

A. He never told Dr. Zimmerman very much of anything. Very few words were said between them, and I asked the doctor myself what they treated on, and he said mostly they treated on the back and he commenced to explain about the nerves of the back, how they would do, and I didn't know anything about osteopathic work myself, but it didn't interest me very much and I didn't say very much about it, and my husband didn't.

Q. State whether or not Dr. Zimmerman said to your husband that his condition was a condition of growth lasting over a very considerable time.

A. There wasn't such a thing as growth mentioned—not a thing. He never mentioned about a growth. He simply told him that if he would let him treat him, he would make a well man of him.

Q. State whether or not your husband had any anxious expression on his face?

A. I never noticed any—nothing more than he usually had—that day.

Q. State whether or not he was any different that day from what he had been previously.

A. He hadn't been any different that day to what he had been.

Q. What was his condition previously, as to being normal?

A. Well, he was more of a quiet type than I was. I was more nervous than he was. I never noticed anything nervous.

Q. State whether or not he told Dr. Zimmerman that he was worried.

A. He never in my presence.

Q. State whether or not your husband's business affairs in any respect caused him to worry?

A. He never had anything to cause him worry that I ever knew, any more than any other farmer had. He was a good manager, and always knew how to manage everything. He was a man that never worried much about anything.

Q. Tell the jury what about that warning that Dr. Zimmerman gave as there only going to be two endings of your husband, insanity or death.

A. I never heard anything about insanity or death mentioned in my presence, and I was with him all the time. He never mentioned such a thing to my husband. He only told him, 'If you take treatments of me a few times, I will make a well man of you.' That is what he said. No such words as death or insanity mentioned in my presence."



*Moats was a man whose uprightness of life and recitude of conduct stood as a greater contradiction to the charge of fraudulent conduct made by the insurance company than the testimony of any witness could possibly be.*

WILLIAM R. CHATTIN (Trans. p. 406) was a pioneer in the vicinity of Summerville, where Mr. Moats and his family lived, and was intimately acquainted with Mr. Moats. He said (p. 407):

“Q. Describe to the jury his appearance as to whether or not he complained of any ailment, or looked as though he was ill, nervous, or weak?

A. He was a very stout looking man, and was gentlemanly in his conduct, and upright in every respect, as far as I could see or learn in regard to him.”

“Q. (p. 408) Are you acquainted with his general reputation in the community where he resided for being an honest, upright man?

A. It is good.

Q. Tell me whether you are acquainted or not?

A. How is that?

Q. Tell me whether you are acquainted with it or not?

A. I am acquainted, yes.

Q. Tell the jury what it is—good or bad?

A. *His reputation, his character and all was good in the community in which he and I lived.*”

JOHN H. NEWBILL (Trans. p. 410) said:

“Q. Where do you live, Mr. Newbill?

A. Summerville.

Q. How long have you lived there?

A. Between seven and eight years.

Q. Were you acquainted with George Scott Moats in his lifetime?

A. I was.

Q. How intimately had you known him?

A. Well, we were—we were particular friends.

Q. Had you seen him very often during the month of March and the month of February, 1911?

A. Yes sir.

Q. State whether or not you attended church there in Summerville at the same time he was there?

A. I did.

Q. Tell the jury whether or not you noticed anything about him of a peculiar or uncommon nature or character in his conduct—or character?

A. I noticed nothing wrong about the man at all.

Q. Are you acquainted with his general reputation in that community as to being an honest and upright man?

A. I am.

Q. Tell the jury what it is—good or bad?

A. *His reputation was good—no man could deny his honesty."*

D. R. McKENZIE (Trans. p. 416) testified as follows:

"Q. Where do you live?

A. In summerville.

Q. How long have you lived there?

A. With the absence of three years have been there 22 years. I think it was. Been three years from the place.

Q. What is your business.

A. Postmaster.

Q. Postmaster. And did your ever—do you have any other business in connection therewith?

A. Yes, and general merchandise store.

Q. Were you acquainted with George Scott Moats in his lifetime?

A. I was.

Q. How long have you known him?

A. About 11 years, somewhere close to that time.

Q. Are you acquainted with his general reputation in the community where he resided?

A. I am.

Q. For honesty and uprightness of life?

A. I am.

Q. Tell the jury what it is.

A. *Why, I consider it good. I hadn't heard any one say anything to the contrary."*

"Q. (p. 422) *Your were subpoenaed here by the defense, were you not?*

A. *I was."*

It will thus be seen that both witnesses for the beneficiary and the insurance company united in testi-

fyng to the uprightness of life, truthfulness, honesty and good reputation of George Scott Moats.

It thus obviously appears that the charge of the insurance company, that Mr. Moats had been guilty of fraud, not only ran contrary to the manner of life of Mr. Moats, but was contradicted not only by the testimony of Mrs. Moats, but by the manner in which the witnesses for the insurance company testified. They were indefinite and uncertain. Dr. Upton, could not fix his time, could not remember the conversation, and the value of his testimony, while exclusively for the jury, would not find credence in the belief of any court. Dr. Molitor's testimony is not a contradiction. He did not even show a consultation. Dr. Loughlin was mistaken in the date, for it is impossible to believe that Mr. Moats would consult him for a serious disorder on the morning of a certain date, and in the afternoon deny it, or conceal it.

As to whether or not Mr. Moats was suffering from nervousness and any disease of the brain, the testimony of his friends and neighbors shows that nothing unusual was noticed in him. He was one of those perfect specimens of physical and mental manhood which come to an untimely end, in some of those unexplainable ways that mankind has been known to suffer. It was the sudden shock of some sort, after his insurance had been perfected, that caused him to meet his maker in a sorrowful but unusual way. Some sudden shock or physical injury came to him that threw him overboard and sent him to the asylum. The restraint which he received at the sanatorium and at the hospital was sufficient to have caused it. This appears from the testimony of Dr. Upton (Trans. p. 278):

“Q. Now Doctor, you said in your cross

examination that it was possible for insanity to develop in a very short period of time. Now, I will ask you if it isn't a fact that, in the absence of evidence of any very sudden shock, or of physical injury in most, if not all such cases, an examination of the previous history will disclose some symptoms of nervousness?

A. Yes sir.

"Re-Cross Examination (p. 279):

Q. By sudden shock or physical injury, what would you include?

A. Any injury. Any nervous surprise, exhaustion—well, any nervous surprise, any surprise, whether it be pleasant, or grief, or some other feature.

Q. Suppose he was put in restraint at a hospital against his will?

A. That is all right.

Q. That would affect it?

A. Yes sir.

Q. And if that condition of affairs existed, you would be inclined, would you not, to attach a great deal of importance to that fact as a symptom, would you not?

A. I certainly would."

The foregoing statement is believed to be a fair, accurate and complete statement of the testimony, showing the lower court to have been correct when he said that upon this point the testimony was conflicting, and presented a case for the jury. The mere fact that the defendant in error was compelled to send Dr. Loughlin's affidavit to New York as a part of her proofs of death, does not in the least bind her.



In the case of Insurance Co. vs. Higgenbotham, 95 U. S. 380, 388, the supreme court of the United States considered just such a state of affairs. We quote:

“At the close of his charge, the judge instructed the jury as follows: ‘That the plaintiff is not responsible for or in any way affected by any of the statements in Dr. White’s affidavit, unless the jury find that before and at the time of filing it with the agent of the company she had actual knowledge of its contents, and adopted and used them as her own declarations. That affidavit is her declaration or no, as she knew and was advised of it and procured and approved it.’ To which instruction the counsel for the insurance company then and there excepted.”

The supreme court of the United States considered that exception, saying at page 390:

“Whether the presentation of the affidavit of White by Mrs. Day made its contents evidence, whether she knew its contents or not, whether she did or did not adopt or procure it, was not of the slightest consequence. The paper contained nothing that was legal evidence upon the point in issue, and a verdict founded upon it could not have been sustained. The disposition of the subject by the judge was one that could not possibly work legal injury to the insurance company. There was, therefore, no error.”

The conclusions to be drawn from the foregoing may be summarized as follows:

The defendant in error is entitled to have the issues tried according to the course of the common law. This means a common law jury, and a common law jury trial.

## Bates Fed. Procedure at Law, Sec. 1054.

In order, therefore, to obtain a trial under these circumstances, all issues of fact must be submitted to and decided by the jury.

## Bates on Federal Procedure at Law, Sec. 1093.

Two questions, therefore, existed upon which the jury were to pass:

First: It was a question for the jury, whether or not the assured made untruthful answers to the questions contained in his application, and to the medical examiner.

Second: It was a question for the jury should they find that the assured did consult with physicians other than as stated in his answers to the medical examiner, whether or not that consultation was for a serious disorder or a slight and temporary disposition. In either event, this court cannot say as a question of law, that there has been misrepresentation such as will avoid the policy. It appears to us that all the court can say is, as said to the jury by Mr. District Judge Bean, in speaking about the testimony of Dr. Laughlin (Trans. p. 429), "Now there is a controversy here as to whether that conference took place or not," and in speaking of the general situation, he summarizes, at page 430, as follows: "So that these are questions for you to determine from the testimony."

Let us close the argument upon this branch of the case by quoting section 1091 of the excellent work on federal procedure at law, by Mr. C. L. Bates:

“Questions of law are to be determined by the court; questions of fact, by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former. No question of fact must be withdrawn from the determination of the jury, whose function it is to decide such issues. The line which separates the two provinces must not be overlooked by the court; and care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed by the court upon the evidence, and the instructions given as to the law. The jury must be made to distinctly understand that what is said by the court as to the facts is advisory only, and in nowise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them, by recalling the testimony to their recollection; by collating its details; by suggesting grounds of preference where there is contradiction; by directing their attention to the most important facts; by eliminating the true points of inquiry; by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is no duty more important resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their functions wisely and well without this aid. In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting the case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their

attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."

## THE INSTRUCTION COMPLAINED OF IN THE FIFTH ASSIGNMENT OF ERROR, IS ERRONEOUS.

By reference to the instruction complained of in the *fifth assignment of error*, at page 7 of the brief of plaintiff in error, the court will observe that it contains several propositions.

First: "If a man makes a representation as of his own knowledge, not knowing whether it be true or false and it is in fact untrue, he is guilty of fraud, as much as if he knew it to be untrue."

There is no contention in this case that Mr. Moats made any such representations and such an instruction would not apply.

Second: The instruction further contemplates: "If you find from the evidence in this case that the insured George Scott Moats did on the 16th day of March, 1911, represent to the defendant in this case that he has never had any disease of the brain or nervous system or that he had not consulted a physician within three years from the date of said representation, except once for a pain in the back."

The court will observe that this idea was amply and faithfully covered by the trial court in a very intelligent way, and in a clear manner, so that no possible error could be predicated, if this idea were dissociated from the instruction and contained in a separate paragraph.



Third: "Or that no other company had ever declined to issue a policy upon his life, or either of them."

The unintelligible character of this statement is at once apparent, but beyond this, there is no issue made upon that question. Mr. Moats is not charged with failing to disclose other insurance. Then the instruction proceeds:

"And you further find that the deceased prior to said date had suffered from any disease of the nervous system or brain, and further find that he had consulted physicians more than once within three years from the date of said representation, and had been rejected as an applicant for insurance in any other Insurance Company, and you further find that said representations were material to the risk, and further find that said representations were in fact untrue, then your verdict must be for the defendant."

The vice of this instruction appears when all of the foregoing parts are placed together in one instruction.

In the first place, the question of falsely answering as to the other insurance, has never entered into this case, and consequently to make that a contingency upon which liability depends, would be highly erroneous. Again, counsel, by this instruction would submit the question as to the materiality of the representations to the jury. If this be the law, then counsel cannot complain because the lower court instructed the jury, as a matter of law, that the questions contained in the application were material to the risk, and we have yet to hear of an insurance company, or any other plaintiff in error obtaining a reversal for error in their favor.



The case of *Regan vs. Mutual Life Insurance Co.*, 189 Mass. 555; 76 N. E. 217, quoted at page 47, et seq. of plaintiff in error, has no application to this case. There is no contention in this case that the policy is incontestible, nor that the insurance company agreed never to set up fraud as a defense, but *the contention is that there was no fraud*, and that these contentions were for the jury, who, after hearing the entire case, so found.

Again, there is no claim in this case that the insurance company was contracting with an individual who was *non compos mentis*, or who had been executed for the commission of a felony, as was the subject of consideration in the case of *Burt vs. Union Central Life Insurance Company*, 187 U. S. 362, 364. (See pages 50 and 51 of brief of plaintiff in error.) But, upon the other hand, it is not universal that a policy is rendered uncollectible by the assured committing a capital felony, and upon trial and conviction, executed for that felony. It simply depends upon the law of the state where the policy is issued.

See *McCue vs. N. W. Mut. Life Ins. Co.*, 167 Fed. 435.

The complaint of the plaintiff in error that Mr. Moats was insane, and therefore not in sound health is not well founded. Neither does it follow, also, that the conclusion that to insure a man who was insane would be subversive of sound morality and against public policy. The fact remains, nevertheless, that a man may be insane and yet be in perfect physical condition, have no disease, and outlive the most healthful and brainy risk ever presented.

The supreme court of New York, in the case of *Robertson vs. Metropolitan Life Ins. Co.*, 37 N. Y. Sup. 146, affirmed without opinion, in 53 N. E. 1131, held, that the term "sound health" refers to the physical condition of the person, and that one whose mental condition is that of an imbecile, and who is in fact a cripple, may, nevertheless, be in sound health.

Furthermore, insanity does not, as a matter of law, constitute an unsound condition of health so as to falsify a statement that the health of a relative applicant is sound.

*Jacklin vs. Hartford Nat. Life Ins. Co.*, 75 Hun. (N. Y.) 595; 27 N. Y. Sup. 1112.

It therefore follows that even if the contention of the plaintiff in error were true, that the policy did not take effect unless delivered during the lifetime, the court cannot say, as a matter of law, that the mere fact that Mr. Moats went to the hospital and later became insane, necessarily affects the situation. It is merely a circumstance to go to the jury, as to whether or not the contract between the parties has been breached, and a request that the court decide the matter as a question of law, is properly denied.

Of course by this argument we are not admitting the contract to be any different from that which we have previously contended it to be, but are simply replying to the contention of the plaintiff in error, by showing that their contention is not supported by the law.

## CONCLUSION.

There is, therefore, presented for decision a case in which one of the prominent farmers of Union County, Oregon, applied to the New York Life Insurance Company for a policy of insurance. There had been indicated to him in advance the kind of a contract the company was willing to accept. Official forms of application with receipt attached were submitted to him for signature. The medical examiner's report was filled out by the company's own medical examiner, and Mr. Moats complied with everything the company seemed to think was necessary. He answered them truthfully, completely and fairly as to his previous life history. He paid them in advance the sums they demanded for the risk. The medical examination which he passed, showed him to be a risk which the company was willing to take. The Company, on the 18th of March, 1911, as shown by McCall's exhibit B being what is shown in the record as the Home Office Memorandum, sent out its inspection blanks (Transcript, pages 159-161), and we have a right to presume that the inspection was duly made. In short, every item of information demanded, was submitted. No demands of any other sort were made upon the assured. He rested in the sound and justifiable conviction that he was insured from the 16th day of March, 1911. He received a policy in accordance with the terms of the proposal. He made no false representations. He made no statements of any kind that would convince a jury or a court of a fraudulent enterprise. The question of a change of health, if there was such a change, cannot be brought into the case. If it was a material issue, the defendant in error was entitled to know of it so that she could offer the balance of the testimony upon the question. She would have the right

to point out that the trip to Portland was occasioned only by a temporary attack. She would have the right to assert, if she could, that it was of a temporary character, or offer any other testimony she may have on the question. As a matter of fact, Mr. Moats was discharged from the Oregon insane asylum as cured, thereby showing that whatever attack he had was of the remotest kind and of no material consequence. In other words, she would have the right, had an issue of fact been tendered to her, to have met it in any legitimate way. The result would have been that the question would have been submitted to the jury and by them passed upon. Then, at last, it is not a question at law for the court to decide. The vicious and extravagant characterization of the case by the plaintiff in error is not justified by the record. There is not only no fraud in the case before the application, as decided by the jury, but there is no fraud after the application.

It is not unusual for insurance companies, in the preparation of forms of application and the kinds of proposals which they are willing to receive for insurance, to take the chances of a change of health between the date of application and the date of delivery of the policy. It has been the practice of some insurance companies to do so for 40 years.

The Supreme Court of the United States in the case of *Insurance Co. vs. Higginbotham*, *supra*, says:

“In many English companies a formal acceptance of the proposal for insurance is issued. In some companies this acceptance is unconditional, so that the premium be paid within the month, the letter of acceptance running to the effect that the proposal has been accepted, and that a receipt is ready at the office for the premi-



um upon the payment of which the assurance will commence; but that, if the same be not paid within thirty days, a reappearance and fresh certificate will be required. In other companies the acceptance is qualified by the condition, not only that the insurance shall not commence till the payment of the premium, but that no material change shall have occurred prior thereto. Bunyon, 58, cited Bliss, Sec. 99.

*The practice is not uniform, and there is nothing remarkable in allowing a certificate of health to stand good for thirty days, no reappearance or examination for that interval being required."*

Insurance Co. vs. Higginbotham, 95 U. S. 387. As has been said by a learned expert on insurance law:

"It is evident that the primary requisite essential to the existence of every contract of insurance is the presence of a risk of loss. Risk is essentially the subject of the contract. If there be no risk there can be no contract, and until the risk commences the contract does not attach."

1 Cooley, Briefs on Insurance, page 80.

There are all sorts and forms and kinds of insurance contracts. Fire risks, sea perils, accidents and life policies and, in turn, each of these classes of insurance businesses have various forms of contracts. The insurance companies are allowed to make all sorts and forms of contracts with the exception and limitation only that they must be lawful contracts.

As was said by Mr. Roger W. Cooley in his Briefs on the law of insurance, volume 1, page 832:



*"It may be stipulated in the application that the risk shall commence upon a day named therein and in such case the policy would cover a loss occurring before its issuance but after the day so named."* Citing *Ins. Co. of North America vs. Thornton*, 55 L. R. A. 547; *Krumm vs. Jefferson Fire Ins. Co.*, 40 Ohio State 225; *Hardwick vs. Ins. Co.*, 20 Ore. 547.

"It may, however, be agreed to commence the risk on the date of the application. In such case the policy must be regarded as dated back to the date of the application."

1 Cooley, Briefs on Insurance, 844.

Again, "If the policy is endorsed on the back as beginning at a certain time and the same time is recited on its face, such endorsement and recital will prevail over a general provision of the policy that it is not to take effect until issued and delivered to the insured, and if it has been issued and delivered it takes effect from the date as stated by its terms and not the date it is delivered."

*Gordon vs. Casualty Ins. Co.*, 54 S. W. 98.

It will thus be seen that it is perfectly right and proper for the parties to agree upon a date at which the risk shall start and this risk being one of the essentials of insurance, may be assumed by the insurance company from the agreed date.

That was done in the case at bar. The risk of those facts, circumstances and exigencies happening after the date of the application which might or might

not result in death, thereby rendering the liability, theretofore contingent, absolute was assumed by the insurance company by the express terms of the proposal contained in the form of application which they evinced a willingness to accept.

It follows, therefore, from these considerations that the verdict of the jury and judgment of the lower court are right and the judgment should be affirmed.

Respectfully submitted,

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IN THE  
**United States Circuit Court**  
**of Appeals**  
for the Ninth Circuit.

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NEW YORK LIFE INSURANCE COMPANY,  
a corporation,  
*Plaintiff in Error,*

*v.*

IDA M. MOATS, Guardian of the person and  
estate of GEORGE A. MOATS, a minor,  
*Defendant in Error.*

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**Petition for Rehearing**

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On page 21 of the opinion rendered in the above entitled case, the court used the following language, to which we respectfully direct its attention in connection with the present petition for rehearing:

“How, then, can it be seriously contended that because the deceased did not inform the insurance company that he had been confined in a sanitarium for a disease of the nerves for six days after making application for insurance and prior to the delivery of the policy

by the agent of the company to him, he thereby perpetrated such fraud and deception upon the company as would vitiate the policy?"

We also respectfully direct the court's attention to the following language found on page 22 of said opinion:

"We think that the doctrine of continuing representations is eliminated from this case by the express provisos contained in the application for insurance and in the policy, that upon payment of the first premium and upon delivery to and receipt by the deceased of the policy during his life time, the policy should then relate back to and take effect as of the date of application."

As thus appears from the face of the decision itself, the applicant for insurance was confined to a sanitarium between the date of his application for a contract of insurance and the date of the consummation of that contract and was during such period of time suffering from a disease of the nerves, which facts he failed to disclose to the insurance company. It also appears from the face of said opinion that the court does not dispute the doctrine of continuing representations, but holds that such doctrine has no application to the case at bar, because, by the provisions of the application and the purported contract, the same was to relate back and take effect as of the date of the application.

The plaintiff in error respectfully urges that the contract referred to could not be made to relate back to the date of application until such contract had in fact been made. In other words, the clause providing that the contract should relate back and take effect as of the date of application presupposes and requires that there be a contract to which the doctrine of relation could apply. In the case at bar it was expressly agreed between the contracting parties, as shown by the undisputed testimony, that no contract should be considered to exist until the same had been delivered, and the plaintiff in error again respectfully urges that there never was any contract in the case at bar because of the fact that before its delivery, which was a condition precedent to the very existence of any contractual relation, the subject matter of the contract had been materially changed.

The applicant was asked whether or not he had ever suffered from any disease of the nerves; he was also asked whether he had ever suffered from insomnia. It also appears from the uncontradicted evidence that both of these diseases were material to the risk, and that, had the company been advised of the existence of either, it would not have issued the policy.

If between the date of Mr. Moats' application and the date of the delivery of the purported contract, Mr. Moats had in fact died and his heirs had not advised the company of this fact, could



it then have been logically contended that the provision by virtue of which the contract was to relate back to the date of application, precluded the company from successfully contesting the risk? Both common sense and an unbroken line of authorities contravene the possibility of a contract under such conditions. Before the minds of the parties could have met, the subject matter of the contract would have been destroyed. Both parties to a contract of life insurance contemplate as an implied representation that the applicant is actually alive and that such life continues pending negotiations for the contract. Both parties to a life insurance contract also contemplate that the individual presenting himself for insurance shall continue to be the same individual pending negotiations for the contract. How can one rule be logically applied to the first state of facts and another rule applied to the second state of facts? This very proposition was discussed in the case of *Cable v. United States Life Insurance Company*, 111 Fed. 19, in the following language:

“Independent of these considerations, (*i.e.*, as to whether the statements in the application were warranties or representations and were continuing) and growing out of the very nature of the subject matter, there was a legal obligation resting upon Cable and upon those acting for him to disclose any material change in his condition of health between the time of

the application and the time of the delivery of the policy." *Cable v. United States Life Insurance Company*, 111 Fed. 19, 26-30.

This very doctrine was also expounded in the following case from the Supreme Court of North Carolina, which case has been found since the submission of the case at bar. A careful reading of the North Carolina decision discloses that there was no provision requiring that the applicant should be in good health and insurable condition at the time of the delivery of the policy, the only requirement being that the insured be alive and the first premium paid. The court, however, applied the doctrine of continuing representations in the following very able and exhaustive discussion:

"The application contained this language just above the signature of Hahn: 'It is hereby declared \* \* \* also that the policy of insurance hereby applied for shall not be binding upon this company until the amount of premium as stated therein shall have been received by said company, or some authorized agent thereof, on proper receipt of the company, during the life time of the person therein assured.' \* \* \*

"Was it the duty of the assured to communicate to the company any material change in his health in the interval between the application and the completion of the contract by the payment of the premium?

"No rule seems to be better settled than that upon a contract of insurance. It is the duty of the assured, at or before the making of the contract, to communicate all the facts within his knowledge which may affect the risk. 1 Phil. Ins., Sec. 524; May Ins., Sec. 200, p. 210.

"This duty cannot be the less obligatory because the assured has shortly before represented or warranted a fact to be true, which then was true, but has since ceased to be so. In such case the insurer naturally and rightfully infers that the thing insured continues in the same condition as far as the assured knows.

"In *Edwards v. Footner*, 1 Camp, 530, the action was on a policy of insurance on goods in the *Fanny* from London to Hayti. The ship was captured by a French privateer with the goods on board. About a week before the policy was signed, the broker for the plaintiff stated to the defendant that the *Fanny* was to sail with certain armed ships, and that she herself was to carry ten guns and twenty-five men. The *Fanny* in fact sailed by herself, and carried only eight guns and seventeen men. Lord Ellensborough said, 'If a representation is once made it is to be considered as binding, unless there is evidence of its being afterward altered or withdrawn.'

"In *Traill v. Baring*, 4 De. Gex., Jones and Smith, 318, the facts were: The International Life Assurance Society had assured the life of Lydia Taylor for a large sum. On 9th May, 1861, the society assured her life for £3,000

(a part of the sum) with the Clerks' Association, on 10th May the secretary of the association called on the secretary of the Reliance Society, and proposed that that society should take part of their risk on Lydia Taylor's life by way of re-assurance, stating that the Victoria office had agreed to undertake that risk to the amount of £1,000, and that the association would themselves retain £1,000 of it, and proposing that the society would take the remaining £1,000. The proposal was accepted on the same day. On 18th May, a policy was accordingly issued, being the one on which the action was brought. It was afterwards discovered that the association, instead of retaining the risk themselves to the amount of £1,000, had on the 15th May (three days before the date of the policy) assured by way of re-assurance the whole of its risk with the Victoria office. Lydia Taylor died and the society refused to pay.

"Lord Justice Turner said: 'I take it to be quite clear that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation



has been made the alteration of those circumstances; and that this court will not hold the party to whom the representation has been made bound, unless such a communication has been made.' May on Insurance, Secs. 190, 191, pp. 199, 201.

"In both the cases cited, it was admitted there was no actual intent to deceive, and that the representations were bona fide, and true at the time they were made.

"We think these cases stand on the ground of an admitted principle of equity, which substantially runs through the whole law of that class of contracts in which confidence is reposed in each other by the contracting parties.

"The plaintiff is not entitled to recover on the policy. He is entitled to recover the premium paid, on the ground that, as the risk never accrued, there was a total failure of consideration, but not in this action, as it is not demanded."

G. A. Whitley, Adm'r, etc., v. The Piedmont & Arlington Life Insurance Co.,  
71 N. C. 481, 483-485.

Even if it could be logically held that the health of Mr. Moats was not materially changed during his six days' confinement at the sanitarium, owing to the fact that he apparently got well, nevertheless the mere fact that he had for six days suffered from manic depressive insanity would justify the inference, at least, that he never fully recovered from this attack, especially in view of the fact that this was the disease from



which he died. Had this very disease killed him between the date of his application and the date of the delivery of the purported contract, and had the fact been concealed from the company, such concealment would undoubtedly have been branded as fraud. The actual concealment of his insanity was no less a concealment than would have been the concealment of his death. To hold that such a concealment was any less a fraud than the concealment of his death is to reduce fraud to a mere question of degrees, making it destructive only according to its quantity and quality.

For the reasons herein set forth, we respectfully submit that a rehearing should be granted in the above entitled case.

PLATT & PLATT,  
*Attorneys for Plaintiff in Error.*

UNITED STATES OF AMERICA, }  
 DISTRICT OF OREGON. }

I, Hugh Montgomery, one of the attorneys for the plaintiff in error in the above entitled cause, do hereby certify that I have prepared the foregoing petition for rehearing, and that the same is in my judgment well founded and that it is not interposed for delay.

HUGH MONTGOMERY,  
*Of Attorneys for Plaintiff in Error.*

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